

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

- - -

MARK BROACH, . CASE NO. 1:12-cv-066  
Plaintiff, . *Day 6 of Jury Trial*  
- v - . *Afternoon Session*  
CITY OF CINCINNATI, . Wednesday, August 28, 2013  
Defendant. . 1:10 p.m.  
. . . . . Cincinnati, Ohio

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STEPHANIE K. BOWMAN, MAGISTRATE JUDGE  
AND JURY

For Plaintiff: ALPHONSE A. GERHARDSTEIN, ESQ.  
JENNIFER L. BRANCH, ESQ.  
Gerhardstein & Branch Co., LPA  
432 Walnut Street, Suite 400  
Cincinnati, Ohio 45202

For the Defendant: AUGUSTINE GIGLIO, ESQ.  
JESSICA L. POWELL, ESQ.  
Assistant City Solicitors  
Room 214 City Hall  
801 Plum Street  
Cincinnati, Ohio 45202

Also Present: Mark Broach  
Roy E. Winston, Assistant Fire Chief

Law Clerks: Joan P. Brady, Esq.

Courtroom Deputy: Jan S. Lahley

Court Reporter: Maryann T. Maffia, RDR

## P R O C E E D I N G S

BEFORE THE JURY

COURTROOM DEPUTY: Court is back in session. Please be seated.

THE COURT: Mr. Giglio, whenever you are ready.

MR. GIGLIO: Thank you, Your Honor.

DEFENDANT'S EVIDENCE

CONTINUED DIRECT EXAMINATION OF KEVIN CAMPBELL

BY MR. GIGLIO:

Q. Captain Campbell, I want to ask you, were you aware of Firefighter Ron Evans filing an EEO charge, internal charge, on or about February the 11th, 2010? Did you ever become aware of that?

A. Yes.

Q. When did you first become aware of that?

A. It was after I had put a transfer request to come back to Engine 34. Sometime after that is when I was contacted by -- I'm not sure. I have to think about that. I'm not sure of the contact.

Q. Okay.

A. Someone from Administration.

Q. Okay. Regarding Mr. Evans' previous -- there was some discussion earlier about previous discipline -- not discipline, previous charges of discrimination against you. Do you remember that discussion? I thought we discussed that.

1 If not -- has there been?

2 A. Yes. He -- when -- I gave him a reprimand for not paying  
3 off, and then following that he claimed an EEO, an EEOC, one  
4 of those. I'm not sure which complaint, but that was race  
5 based.

6 Q. All right. And do you know what happened with that  
7 charge?

8 A. It was dismissed.

9 Q. Was that internal or was that external?

10 A. That was external.

11 Q. All right. I'm going to go back and direct yourself back  
12 to the charge that we talked about earlier this morning from  
13 Mr. Broach, the one in March 18, 2010, just to reorient.

14 A. Okay.

15 Q. When did you first become aware of that charge, if you can  
16 recall?

17 A. I -- it was down the road a bit. I guess -- when I came  
18 back to Engine 34, I transferred back, is when I kind of heard  
19 some of the story of what happened. But the actual charges,  
20 I'd never really -- I still to this day don't know exactly  
21 what he was charged with.

22 Q. If I confused you, it's my fault.

23 A. Okay.

24 Q. I'm not talking about charges against Mr. Broach on the  
25 Potter fire. I'm asking -- let me back up a second.

1 A. I'm confused.

2 Q. That's all right. I thought you were.

3 Mr. Broach, we talked about this morning -- show you  
4 again. He brought an internal complaint naming you and others  
5 under the institutionalized racism, negative comments by you.  
6 Do you remember that document?

7 A. Okay.

8 Q. Do you need to see it again?

9 A. Yeah, I'd like to.

10 Q. Okay.

11 MR. GIGLIO: It's been previously published. I know  
12 the camera is the other way.

13 Q. I'm talking about this document. Do you remember --

14 MR. GERHARDSTEIN: What exhibit are we on?

15 MR. GIGLIO: JX-1, Joint 1.

16 Q. This is the one I'm talking about.

17 A. Okay.

18 Q. When did you first become aware of this charge? It's  
19 dated March 18, so my first question is: Was it after March  
20 18th that you knew about this charge?

21 A. Absolutely.

22 Q. Did you know about this charge before it was filed?

23 A. No.

24 Q. All right. Can you tell -- could you tell anybody -- can  
25 you tell us approximately --

1           If you know. If you don't remember. We're over three  
2 years ago.

3           -- when you first got notice of this charge?

4 A. I don't recall the actual date.

5 Q. Okay. That's fine. Were you ever contacted by HR  
6 regarding that charge?

7 A. That's when I heard about the charge.

8 Q. Do you remember who contacted you?

9 A. First -- the only person from HR I talked to was Lisa  
10 Berning.

11 Q. When did you first talk to Lisa Berning regarding the Mark  
12 Broach, March 18, 2010 charge?

13 A. Mark had been off on leave, on some sort of leave, and  
14 this was filed prior to that. It was not addressed until he  
15 came back from leave, so there was an extended time period  
16 there.

17 Q. If you remember the time period, that's -- do you remember  
18 the month?

19 A. It was months later.

20 Q. All right. When you were contacted, were you asked to  
21 come in and be interviewed by Lisa Berning?

22 A. That's correct, Lisa Berning. And Dave Lemons from  
23 Internal was there also.

24 Q. Just the three of you?

25 A. That's correct.

1 Q. And were you asked questions regarding the charge?

2 A. Yes.

3 Q. And did you respond to Miss Berning's questions?

4 A. Yes.

5 Q. Did she inquire of you whether any of these were true,  
6 wanted your side of the story?

7 A. Yes, absolutely.

8 Q. All right. After that meeting, do you recall having two  
9 additional meetings with Lisa Berning, David Lemons, Mark  
10 Broach and yourself?

11 A. That's correct.

12 Q. Is that shortly after this?

13 A. Oh, it seems like it was -- it was a week or so, a couple  
14 of weeks maybe.

15 Q. Did you know at the time that those were being obviously  
16 -- did the two meetings that you had later with everybody  
17 there, did you know at the time that those were being secretly  
18 recorded?

19 A. No. I didn't have a clue.

20 Q. When did you first learn that they were secretly recorded?

21 A. From you, I believe.

22 Q. What's that?

23 A. I believe from you.

24 Q. Okay. Was it after the litigation started?

25 A. Yes. Oh, yes. Mm-hmm.

1 Q. All right. Did you have an opportunity to listen to the  
2 audio portions of both of those meetings?

3 A. Yes, I did.

4 Q. Did you also have the opportunity to read the transcript  
5 that was prepared regarding those two audio --

6 A. Yes, I did.

7 Q. Okay. Do they accurately reflect, both the audio and the  
8 transcript --

9 A. Yes.

10 Q. Let me finish my question first.

11 Did it accurately reflect the conversation that was held  
12 at those times?

13 A. Yes.

14 Q. All right. I'm going to ask you to look at Joint  
15 Exhibits, if you look at the book, 5 through 9. Do you see  
16 those?

17 A. Yes, sir.

18 Q. Okay. Joint Exhibit 5, is that the transcript of the  
19 October 6 meeting?

20 A. Yes, it is.

21 Q. All right. And Joint Exhibit 6, is that the transcript of  
22 the October 13th meeting?

23 A. That's correct. Yes, it is.

24 Q. Okay. Now, I can play them, but I'm not going to do that  
25 right now. The audio, the Exhibit 7 and 8, do you see those

1 in the book?

2 A. Yes.

3 Q. Okay. Do they purport to be the audios of those two  
4 meetings?

5 A. That's correct.

6 Q. Do you know why you met everybody -- after you met  
7 individually regarding Mr. Broach's claim, do you know why you  
8 had to come back?

9 A. Yes. The lady from HR who wanted to work out any  
10 differences between Mark and I and establish a working  
11 relationship.

12 Q. Okay. Going back to the lady from HR, is that Lisa  
13 Berning?

14 A. I'm sorry. Yes, Lisa Berning.

15 Q. Have you ever had any other contact with her prior to  
16 these charges?

17 A. No. No.

18 Q. And in the course of your duties you talked about this  
19 morning as a captain, did you have any direct contact with HR  
20 and her department?

21 A. No.

22 Q. All right. At the meeting, did you recall if Mr. Broach  
23 was asked by Lisa Berning what was the nature of his claims of  
24 discrimination?

25 A. Yes.

1 Q. All right. Did she ask him more than once or just one  
2 time?

3 A. It was kind of the theme for the next two days, because he  
4 really wouldn't give us anything solid.

5 Q. Okay. Did she ask Mr. Broach how you discriminated  
6 against Mr. Broach?

7 A. Yes.

8 Q. Okay. Did he ask -- she ask Mr. Broach how you harassed  
9 Mr. Broach?

10 A. Yes.

11 Q. Did he give any explanations for those?

12 A. He -- it was the reprimands, is what he wanted to rehash.  
13 He disagreed with those.

14 Q. Those are the reprimands we spoke about this morning?

15 A. That's correct.

16 Q. Who -- just so the record clear, did you bring up the  
17 reprimands at those meetings or did Mr. Broach bring them up?

18 A. I don't recall at this point. It would be on the tapes.

19 Q. Okay. The transcripts will speak for themselves?

20 A. Absolutely.

21 Q. All right. Did you -- were you present when Mr. Broach  
22 gave his explanation of the vehicle reprimand?

23 A. Yes, uh-huh.

24 Q. Was it concise and clear and make sense?

25 A. Not really. Again, he didn't take responsibility for any

1 of his actions. And that's kind of a common theme in this,  
2 you know, no responsibility. I mean, apparatus was wrecked.  
3 The bumper was obviously twisted up. He thought other people  
4 should have been disciplined besides him, but he was in  
5 charge.

6 Q. Did he give any conflicting stories regarding that  
7 accident, whether there was damage or wasn't damage?

8 A. Oh, he said there was no damage. That's what started the  
9 whole thing. When you have an accident with a vehicle,  
10 there's a sequence of events. You have to call your district  
11 chief. You have to call the police. You do all the proper  
12 reporting. Then somebody comes out and investigates it. You  
13 know, it just follows the normal process. Accidents happen.

14 Q. Did he later say there was an accident and the driver was  
15 responsible?

16 A. Yes.

17 Q. Did he state that he -- in his next tour, he then reported  
18 it?

19 A. Well, he did say that, but we had already started the  
20 process.

21 Q. So one day he said there was no accident, one day he said  
22 there was?

23 A. That's correct.

24 MR. GERHARDSTEIN: Objection, Your Honor. Leading.

25 THE COURT: Sustained.

1 Rephrase.

2 Q. Was there a difference in Mr. Broach's explanation of  
3 whether there was an accident one day and a difference --  
4 there wasn't an accident the next day?

5 A. Originally the story was told to me that there was no  
6 accident, nothing to report, and then it all changed, you  
7 know. Then there was an accident. He had told an individual  
8 by the name of Wendell Herm was the oncoming driver, and the  
9 -- Wendell was on vacation. He was on vacation, which was  
10 what made it so outrageous.

11 MR. GERHARDSTEIN: Objection, Your Honor.

12 THE COURT: Sustained.

13 Q. Are you saying he told some firefighter -- he alleges he  
14 told some firefighter that was not present at the time of the  
15 accident?

16 A. He --

17 MR. GERHARDSTEIN: Objection.

18 THE COURT: Let's have a sidebar.

19 SIDEBAR CONFERENCE

20 MR. GERHARDSTEIN: The basis for the objection is  
21 that it's unclear whether the witness is giving us yet a new  
22 version of his ideas about this vehicle accident or whether he  
23 is responding to a question about the exchange at the October  
24 EEO meeting.

25 MR. GIGLIO: My question of the witness is what did

1 Mr. Broach say. Did he -- if I didn't ask it artfully, I'll  
2 ask it again. Did he say it was some driver and --

3 MR. GERHARDSTEIN: He is volunteering that it was  
4 outrageous that this captain, that he was on vacation. He is  
5 going --

6 MR. GIGLIO: I'll withdraw it.

7 THE COURT: Let's try and control him a little  
8 better.

9 MR. GIGLIO: I'll do my best, Your Honor. Thank you.

10 MR. GERHARDSTEIN: You have a transcript.

11 MR. GIGLIO: I do.

12 THE COURT: All right.

13 CONCLUSION OF SIDEBAR CONFERENCE

14 BY MR. GIGLIO:

15 Q. Do you recall Miss Berning asking Mr. Broach what did he  
16 want from you?

17 A. Yes.

18 Q. Did that have to do with -- what did that have to do with?

19 A. I recall him -- he said loyalty, which I, I don't even  
20 quite figure out what he meant by that.

21 Q. Did he bring up the circumstances of an anonymous phone  
22 call regarding reporting someone suspiciously under the  
23 influence of alcohol?

24 A. It was discussed.

25 Q. Did you bring it up or did he bring it up?

1 A. I may have. I don't recall. It would be in the tapes.

2 Q. It will be in the transcript?

3 A. Yes.

4 Q. All right. Okay. Is there anything wrong with an  
5 anonymous complaint?

6 A. Well, as -- first of all, in our administrative  
7 regulations, it doesn't offer you that option. If a -- if you  
8 suspect that someone is under the influence, the rules say  
9 that you observe, you take notes, and then you contact another  
10 supervisor, they observe and take notes. Then it goes up the  
11 chain of command. What -- and that didn't occur. That did  
12 not occur.

13 Q. Could you look at the Defense Exhibit 24? I'd like you to  
14 turn --

15 First of all, are you a member of the Local --  
16 International Firefighters Local 48?

17 A. Yes.

18 Q. Are all your members, including Mr. Broach as far as you  
19 know, members of that union?

20 A. Yes.

21 Q. Are you governed by a collective bargaining agreement  
22 between the City and that union?

23 A. That's correct.

24 Q. In that collective bargaining agreement, are certain  
25 things negotiated?

1 A. Yes.

2 Q. One of the things negotiated, does it have anything to do  
3 with drug and alcohol testing?

4 A. Yes.

5 Q. I'd ask you to point to page 107, please.

6 MR. GERHARDSTEIN: 107?

7 MR. GIGLIO: I believe this was previously published.

8 MR. GERHARDSTEIN: Oh, I'm on the wrong thing. I'm  
9 sorry. Yeah, okay. Go ahead.

10 THE COURT: You may.

11 Q. I'm going to show you Section 4 on drug and alcohol  
12 testing. Okay? I'm going to ask you to look at paragraph  
13 (A). It talks about reasonable suspicion. This is different  
14 than a random test or names drawn out of a hat?

15 A. That's correct.

16 Q. All right. It states halfway down, "The supervisor shall  
17 record, in writing."

18 Would that include someone like Lieutenant Broach?

19 A. Absolutely, yes, it would.

20 Q. All right. And he will "immediately contact a second  
21 supervisor." Am I right?

22 A. That's correct.

23 Q. Okay. And why did the union negotiate -- if you know.  
24 If you don't know, you don't know. But why is a member of the  
25 union to have this policy?

1 A. Well, it's critical. I mean, my goodness, you're in  
2 charge of a 40,000-pound piece of equipment. You're in charge  
3 of four firefighters' lives. You're in charge of the lives  
4 that -- somebody puts a 911 call in, that's your  
5 responsibility. That's what we're all about. That's what we  
6 do.

7 And for someone to say, "Hey, this officer is under the  
8 influence" or "He's intoxicated" or he's -- some sort of drug  
9 involvement and walk away from that responsibility, you know,  
10 is shameful, absolutely shameful.

11 Q. I don't want you to mention the officer's name --

12 A. Yes.

13 Q. -- but give me his race.

14 A. I'm sorry?

15 Q. Can you give me the race of the individual that this  
16 anonymous call was made about?

17 A. That anonymous call was made -- I can't give his name, but  
18 I worked with him for a good ten years. He's African  
19 American. His whole unit is African American. There was an  
20 outstanding group of individuals.

21 Q. Okay.

22 A. It was nothing --

23 Q. That's fine. Just -- I understand. Did it -- let me do a  
24 little follow-up. Did it disturb you that charges were  
25 brought against this outstanding individual?

1 A. Oh, it -- actually no charges were brought against him.  
2 They came up and investigated and found this to be a big  
3 nothing. It was nothing more than harassment.

4 Q. Is that what you interpreted it to be?

5 A. Absolutely. I mean, it's right there in -- you know,  
6 again, it's in administrative regulations that a person's work  
7 environment should be free from harassment. That -- to walk  
8 out of a firehouse when you believe that an officer was  
9 intoxicated is --

10 You know, my question to you is: Have you ever been in a  
11 burning building? You know? And you ever listen to a mother  
12 cry for my baby?

13 MR. GERHARDSTEIN: Your Honor --

14 Q. Please, just --

15 THE COURT: Sustained.

16 Q. And I know you get emotional on these --

17 MR. GERHARDSTEIN: Objection.

18 A. I believe in what we do. And for somebody to --

19 THE COURT: Hold on. I need you to just respond to  
20 the questions that are asked.

21 Q. And I understand. And you may be given more opportunity  
22 to express yourself, but for purposes of this interchange here  
23 --

24 A. I'm sorry.

25 Q. Okay. I'm not cross-examining you, so you don't have to

1 answer yes or no. You can explain. But I -- I'm sure  
2 Mr. Gerhardstein will have that opportunity.

3 So when we talk about -- this talks about a supervisor; am  
4 I right?

5 A. Yes.

6 Q. Okay. And did you talk to Lieutenant Broach about this?

7 A. Yes, I did. I asked him.

8 Q. Was the conversation, the anonymous call recorded by  
9 Internal at the time?

10 A. Internal Investigations has a copy of that conversation.

11 Q. And did you -- did Mr. Broach ever have an opportunity to  
12 hear it?

13 A. Yes, he did.

14 Q. All right. Did he admit, "That's me"?

15 A. I'm sorry?

16 Q. Did he admit it was him?

17 A. Oh, no. He went into this melodramatic -- said it wasn't  
18 him.

19 Q. All right. Sometimes people make anonymous calls, don't  
20 they?

21 Well, I'm not going to do that.

22 Were you -- do you have any reason to believe that by  
23 making an anonymous call as opposed to reporting it as a  
24 lieutenant he could be retaliated against for reporting that?

25 A. Not by me.

1 Q. Okay. It was -- was there quite a bit of discussion  
2 regarding this whole scenario at those meetings with  
3 Mrs. Berning?

4 A. It's detailed out. He denied it.

5 Q. He denied it even at that meeting?

6 A. Yes.

7 Q. And this is after he brought charges against you?

8 A. Yes.

9 Q. After the meetings were over, did you stay and talk to  
10 Lisa Berning about preparing and working on a referral for any  
11 fitness-for-duty?

12 A. What -- no, I did not stay and do what you're saying, no.

13 Q. All right. Subsequent to those meetings, did you get an  
14 e-mail from her regarding that she was going to do this?

15 A. Miss Berning said at the end of the meeting that she would  
16 contact me with her thoughts, and she said she was going to go  
17 to Bo. And I said, "Well, who is Bo?" That was Hilary  
18 Bohannon, head of personnel for the City of Cincinnati, which  
19 -- that's completely out of my realm. And she would send me a  
20 copy of an e-mail and asked for my input.

21 Q. Did you know at that time at the last minute she was going  
22 to refer him for a fitness-for-duty?

23 A. I had a suspicion. I don't think --

24 Q. Did she tell you that?

25 A. I don't recall if it was said there. I don't know.

1 Q. All right. Did you actually have an opportunity after --  
2 or before Mr. Broach was sent out to see the draft report that  
3 she was going to use?

4 A. Before he was sent out?

5 Q. Before Mr. Broach was advised that he was going to be sent  
6 out for a fitness-for-duty.

7 A. I don't know when he was ever advised, but I did receive  
8 an e-mail from her, and I expressed my concerns on that  
9 e-mail.

10 Q. Do you know if her draft was changed at all based on your  
11 e-mail?

12 A. I never spoke with her again after that, never saw her  
13 again after that. I did see her in City Hall six, nine months  
14 ago just in passing, but I've never spoken or seen the woman  
15 since.

16 Q. Were you involved in the Fire Department agreeing with her  
17 recommendation that Mr. Broach would be sent out for a  
18 fitness-for-duty?

19 A. I responded to her e-mail.

20 Q. Right. My question, did you -- were you involved in the  
21 Fire Department's decision --

22 A. No. No. I would have no -- as a captain, you have no  
23 input.

24 Q. You have no input? No one asked you from the Fire  
25 Department?

1 A. No.

2 Q. Were you involved in what type of releases he should sign  
3 or not sign for such an exam?

4 A. I don't -- no. I have nothing to do with that.

5 Q. Were you involved at all in his return to work after he  
6 eventually had such an exam?

7 A. No.

8 Q. And were you involved in -- well, strike that.

9 Do you recall, if you recall, any other basis given by  
10 Mr. Broach --

11 Other than ones you talked about, the reprimands, the  
12 disloyalty issue, the performance evaluations we've talked  
13 about this morning, can you give any other reasons why his  
14 charge of racial discrimination and retaliation against you  
15 should be brought? Did he give any other explanation?

16 A. No. I -- what's on the tapes. That's about it. Never  
17 quite figured it out.

18 MR. GIGLIO: If I can just have one moment, Your  
19 Honor?

20 THE COURT: Sure.

21 (Mr. Giglio and Ms. Powell confer privately.)

22 MR. GIGLIO: I have no more questions, Your Honor.  
23 Thank you.

24 THE COURT: All right. Thank you.

25 Mr. Gerhardstein, whenever you're ready.

1 MR. GERHARDSTEIN: Thank you, Judge.

2 CROSS-EXAMINATION

3 BY MR. GERHARDSTEIN:

4 Q. Good afternoon.

5 A. Good afternoon.

6 Q. You were the captain for Ron Evans and Mark Broach; right?

7 A. That's correct.

8 Q. And you were having lots of trouble with Ron Evans; right?

9 A. I had limited trouble with him.

10 Q. And he filed a discrimination charge against you in 2005;  
11 right?

12 A. That's correct.

13 Q. You must have been upset by that.

14 A. A racial charge? Absolutely, yeah.

15 Q. And then he filed another one against you in February of  
16 2010; right?

17 A. That's correct.

18 Q. Lisa Berning investigated that charge; right?

19 A. That's correct.

20 Q. And she would have talked to you at some point before  
21 October about Ron Evans' discrimination charge; right?

22 A. Well, Ron was on extended leave, and they don't --

23 Q. You know what? My question was she would have talked to  
24 you. If she didn't, the answer is no.

25 A. Okay. Ask me again, because there's so much confusion

1 here with time.

2 Q. Slow down. We'll be fine.

3 A. All right.

4 Q. She would have talked to you before September of 2010  
5 about Ron Evans' charge, wouldn't she?

6 A. I don't -- I don't recall when we spoke.

7 Q. Okay. You were upset again when you got hit with another  
8 discrimination charge; right?

9 A. Sure, because everyone in my house is African American.

10 Q. And then -- your firehouse; right?

11 A. Yes. Yes.

12 Q. And then that one turned into a federal lawsuit that's  
13 pending in this building; right?

14 A. That's correct.

15 Q. And your lawyer is sitting in the courtroom; right?

16 A. That's correct.

17 Q. So --

18 A. So is his.

19 Q. -- the --

20 So is his? I'm sorry?

21 A. His attorney.

22 Q. Whose attorney?

23 A. Mr. Evans.

24 Q. Oh. Ron Evans' attorney is sitting in the courtroom?

25 A. Yes.

1 Q. All right. So both of them are here?

2 A. Yes, sir.

3 Q. So I guess Ron Evans' case is being watched; right?

4 A. Well, looks like it.

5 Q. And that's upsetting to you, to have --

6 A. To be watching?

7 Q. -- another discrimination charge; right?

8 A. Well, it's offensive.

9 Q. You were named by Lieutenant Broach in a discrimination  
10 charge, which you've looked at a couple of times in your  
11 testimony, and he filed that on March 18th; right?

12 A. Okay.

13 Q. And you knew that Lieutenant Broach was going to be a  
14 witness for Ron Evans in his charge; right?

15 A. No, I didn't know that.

16 Q. You didn't learn that in -- prior to your meetings with  
17 Lisa Berning?

18 A. Now you're confusing me.

19 Q. Well, you had some meetings with Lisa Berning; right?

20 A. Yes.

21 Q. And prior to those meetings, you knew that Lieutenant  
22 Broach was going to be a witness for Ron Evans; right?

23 A. Possibly. When you say "for Ron Evans," in what?

24 Q. In Ron Evans' discrimination case.

25 A. In a lawsuit? There was no lawsuit filed.

1 Q. No, his EEO complaint.

2 A. That would be okay. Right.

3 Q. Right. I'm going to show you what's been previously  
4 marked as Plaintiff's Exhibit 27. This is an e-mail,  
5 anonymous. It just says, "Members of 34."

6 A. What's the exhibit? What is the number?

7 Q. It's 27, Plaintiff's Exhibit 27. It's an e-mail to the  
8 chief dated January 18, 2010, and the subject is, "Kevin  
9 Campbell, No Return."

10 Do you see that?

11 A. Yes, I do.

12 Q. And it complains about you creating a hostile work  
13 environment and racial intolerance, which it says "is  
14 inexcusable."

15 Have you seen this before?

16 A. About a month or so ago, yes.

17 Q. Okay. So that was the first time?

18 A. Yes, it is.

19 Q. So were you ever interviewed about the allegations in this  
20 complaint?

21 A. Well, it looks like it -- if I'm looking at this  
22 correctly, it says --

23 Q. No. Sir, my question was: Were you ever interviewed  
24 about the allegations --

25 A. No, I wasn't. No, nuh-uh.

1 Q. Did Internal ever call you and say, "We have an anonymous  
2 complaint about you. I want to check it out"?

3 A. This doesn't say Internal has a copy.

4 Q. No. My question was: Did Internal call you?

5 A. Okay. No, they didn't.

6 Q. Okay. So if this complains about your return to the 34,  
7 you would have wanted to know about that; right?

8 A. Well, sure.

9 Q. And yet all that happened with this was that the fire  
10 chief sent it on to -- I'm sorry. The fire chief sent it on  
11 to District Chief Reed saying, "No name complaint. I can  
12 figure if Ron sent this."

13 Did you ever see that e-mail?

14 A. This is the only thing I've seen, this whole document.

15 Q. All right. So you've not seen this before; right?

16 A. Not until a month ago.

17 Q. And "Ron" would be Ron Evans; right?

18 A. You would have to ask the chief.

19 Q. Okay. And then Howard Reed sends a response saying, "No,  
20 I think it's Broach. He's the real snake there."

21 Did I read that correctly?

22 A. Yes.

23 Q. And did you talk to Howard Reed about this anonymous  
24 complaint?

25 A. No.

1 Q. Did you talk to Chief Wright about this anonymous  
2 complaint?

3 A. No.

4 Q. You would have expected Chief Wright to refer this to  
5 Internal; right?

6 A. I think if Chief Wright thought one-tenth of one percent  
7 of that was true he would have went after me.

8 Q. Okay. So it's your expectation that you have such a good  
9 relationship with Chief Wright that --

10 A. No.

11 Q. -- he'd know that this is all BS and we shouldn't even  
12 investigate.

13 A. I didn't say that. I just --

14 Q. Well, what did you mean?

15 A. I said if Chief Wright, being an African American chief,  
16 sent a note to Chief Howard Reed asking, "What's this all  
17 about?" -- if either one of those individuals thought that  
18 one-tenth of one percent of any of that was true, they would  
19 have hammered me, and they should have.

20 Q. And yet, nothing happened?

21 A. That's right.

22 Q. So you've been a trustee of Local 48; right?

23 A. A trustee?

24 Q. Yeah.

25 A. Yes.

1 Q. And that's the fire union; right?

2 A. That's correct.

3 Q. And that's the bargaining unit that represents the people  
4 in the Fire Division; right?

5 A. Yes.

6 Q. And there's something that's always been confusing to me.  
7 The bargaining unit actually includes firefighters, their  
8 lieutenants, their captains and their district chiefs; right?

9 A. Yes.

10 Q. So you have management and firefighters all in the same  
11 bargaining unit; right?

12 A. Yes.

13 Q. And, in fact, the president of Local 48 has often been  
14 just a roughneck; right?

15 A. Yes, sometimes.

16 Q. Okay. Now, when you have management employees responsible  
17 for discipline mixed with the lowest level employees, that  
18 creates some unusual alliances, doesn't it?

19 A. I don't know.

20 Q. Well, let's take a look at Joint Exhibit 5. Joint Exhibit  
21 5 is the transcript of your meeting with Lisa Berning and  
22 Lieutenant Broach and David Lemons on October 6, 2010; right?

23 A. Okay.

24 Q. And at page 68 -- and the page numbers are at the top.  
25 Oops, this one has no 68.

1 MS. BRANCH: Here (handing).

2 Q. At page 68, there is a discussion with Mr. Lemons and Lisa  
3 Berning about the peer review and the review of those  
4 reprimands that you had been talking about in your testimony  
5 earlier.

6 Do you see that, like around line nine, being written up  
7 and there was no one from peer review board agreeing? Do you  
8 see that?

9 A. Yes.

10 Q. Okay. And then after you hear this reference to peer  
11 review, you say, "Well, Reggie Harper was his union rep. I  
12 would told you to talk to him, either one of you."

13 Did I read that correctly?

14 A. That's correct, uh-huh.

15 Q. So you have talked to the union rep who represented  
16 Lieutenant Broach in his effort to challenge your discipline  
17 of Lieutenant Broach.

18 A. That's incorrect.

19 Q. Well, you're referring them to Reggie Harper; right?

20 A. Yes, I did.

21 Q. Okay. So does the fact that you have these management  
22 employees mixed up with the regular workers in the union  
23 trigger any situations where the fire chief gives breaks to  
24 captains like you when problems come up?

25 A. I don't recall ever receiving a break.

1 Q. Well, you didn't get any investigation of the complaint  
2 about you returning to the 34s; right?

3 A. Maybe he didn't believe it.

4 Q. So that's a break; right?

5 A. What's -- I don't follow your question.

6 Q. So if there had been an investigation, at least it would  
7 have cleared the air; right?

8 A. Sure.

9 Q. When you engaged in the --

10 A. I just assumed that the two chiefs didn't believe the  
11 e-mail, so there was no investigation --

12 Q. And, therefore, there was no airing of any complaints;  
13 right? It was just buried.

14 A. It was just an anonymous complaint. I guess.

15 Q. And it was just buried.

16 A. I never saw it.

17 Q. So you understood -- and, by the way, you're a manager;  
18 right? You're a captain; right?

19 A. I'm a captain.

20 Q. Wouldn't it bother you to see a lieutenant referred to as  
21 a snake?

22 A. Under my command, I wouldn't have appreciated it, no.

23 Q. And Internal has the power to investigate everybody from  
24 the chief down; right?

25 A. That's correct. And maybe you should bring Howard Reed in

1 here and ask him what he meant by that.

2 Q. Maybe the City should.

3 So you understood --

4 A. I mean, you can't put that on me.

5 Q. -- when you were engaged in EEO process with Mark  
6 Broach and Lisa Berning that Ron Evans had filed a complaint  
7 because he was upset with the level of discipline you gave  
8 him; right?

9 A. I'm sorry? Say that again.

10 Q. When you were engaged in this EEO process, you knew you  
11 had complaints both by Ron Evans and Lieutenant Broach; right?

12 A. That's correct.

13 Q. And Broach was at least claiming that he thought you were  
14 pressing hard on him, on Broach, because of his failure to be  
15 aggressive with respect to Ron Evans; right?

16 A. Generally, yes.

17 Q. And you know as a supervisor that you're supposed to  
18 discipline blacks and whites equally; right?

19 A. Well, sure.

20 Q. And you know as a supervisor that you actually have a lot  
21 of discretion to use counseling or retraining or the stick if  
22 you need it; right?

23 A. Limited resources.

24 Q. Is that correct, sir?

25 A. It's somewhat correct.

1 Q. So --

2 A. I don't know what you mean by "the stick." What's "the  
3 stick"?

4 Q. Reprimands? Written reprimands?

5 A. Yes.

6 Q. Demotion? Suspension?

7 A. No, no. I don't have the power to do any of that.

8 Q. Well, you can recommend it; right?

9 A. No, I can't. I can't recommend a demotion.

10 Q. You can bring charges.

11 A. I cannot recommend a demotion. I cannot recommend  
12 suspension.

13 Q. Well, hold on. You can bring charges; right?

14 A. I can bring charges.

15 Q. And you know by labeling in a certain way they can have  
16 severe consequences like suspension.

17 A. Well, give me an example of "labeling in a certain way."

18 Q. Well, can you think of any, sir?

19 A. No, I can't. I want you to tell the truth.

20 Q. All right. So if you think --

21 THE COURT: Mr. Campbell, hold on. Just answer the  
22 questions that are asked.

23 THE WITNESS: All right.

24 Q. So if you think that a firefighter has set a fire of a  
25 citizen's building, you can write that up as a charge and it

1 will get them terminated and criminally prosecuted; right?

2 A. I would call the police and pursue it.

3 Q. Right.

4 A. Yes.

5 Q. Okay. So you know though that short of firefighters  
6 starting fires, there are errors that can be handled with  
7 counseling and discussion; right?

8 A. Absolutely.

9 Q. And you know that one supervisor may choose to do more  
10 counseling than another; right?

11 A. I believe so.

12 Q. And you're all supposed to use progressive discipline in  
13 your approach to problems that can be remedied; right?

14 A. Yes.

15 Q. And you and Mark Broach disagreed on the way in which Ron  
16 Evans should be supervised; right?

17 A. No. I never discussed it with Mark Broach on how Ron  
18 Evans should be supervised --

19 Q. Well --

20 A. -- outside training.

21 Q. Okay. When the City called you in to begin its  
22 investigation of Lieutenant Broach's discrimination complaint,  
23 did they do any sort of study on your pattern of discipline  
24 with respect to white firefighters versus black firefighters?

25 A. No.

1 Q. Were you asked to produce any records that reflected your  
2 pattern of discipline with respect to white and black  
3 firefighters?

4 A. No.

5 Q. Did you see any --

6 MR. GIGLIO: Objection, Your Honor.

7 THE COURT: Let's have a sidebar.

8 SIDEBAR CONFERENCE

9 MR. GIGLIO: Your Honor, I only wish to protect the  
10 record. We objected earlier to this whole intrusion line of  
11 questioning on disparate treatment, which this case is not. I  
12 just want the record to reflect that we oppose any questions  
13 regarding percentages, quotas, numbers. It's not part of this  
14 claim and shouldn't be asked of the witnesses, should not be  
15 before the jury.

16 I understand, of course, Your Honor, with respect, but I  
17 just wanted the record to reflect --

18 MR. GERHARDSTEIN: Your Honor, we'll give him a  
19 standing objection on all that.

20 THE COURT: All right. Thank you.

21 CONCLUSION OF SIDEBAR CONFERENCE

22 BY MR. GERHARDSTEIN:

23 Q. Did Lisa Berning tell you the results of her investigation  
24 of Lieutenant Broach's EEO complaint?

25 A. She was frustrated by the --

1 Q. Sir --

2 A. I don't know how to answer that.

3 Q. Did she tell you the results, yes or no?

4 A. No.

5 Q. Did she make any findings?

6 A. Well, she didn't discuss it with me. She sent me an  
7 e-mail.

8 Q. Okay. And in that e-mail, did she tell you whether she  
9 had sustained the EEO complaint or not?

10 A. I don't recall seeing that in the e-mail. I received a --

11 Q. That's because the e-mail you're talking about is the one  
12 that she was sharing the draft of the fitness-for-duty; right?

13 A. I don't know if it was a draft or fit-for-duty or what it  
14 was.

15 Q. But that was the document; right?

16 A. She sent me -- I don't know. I don't know what you're  
17 referring to.

18 Q. Well, let's get straight our e-mails then.

19 A. Okay.

20 Q. Did she send you more than one e-mail?

21 A. I don't believe so.

22 Q. And the e-mail you've testified to was one where she  
23 shared with you her recommendations about the fitness-for-duty  
24 evaluation; right?

25 A. I don't know if it was fitness-for-duty, but I responded

1 to it. There should be a record of it.

2 Q. Okay. And we'll get to that.

3 A. Okay.

4 Q. In -- do you have any recollection at all of seeing any  
5 written findings from an investigation by Lisa Berning?

6 A. By Lisa Berning? I don't recall, no.

7 Q. And as you sit here today, do you know whether there was a  
8 determination one way or the other whether Mr. Broach's EEO  
9 complaint was sustained?

10 A. I believe I got an e-mail from Internal saying it was  
11 unfounded, I believe.

12 Q. Oh. An e-mail from Internal saying his EEO complaint was  
13 unfounded.

14 A. Well --

15 Q. Is that right?

16 A. Or from the chief's office, somewhere from some  
17 administrative point. I think -- I recall, I'm pretty sure I  
18 got an e-mail.

19 Q. Was that before or after Mr. Broach was referred for  
20 fit-for-duty?

21 A. I truly don't recall.

22 Q. And during the course of this litigation, have you been  
23 asked to produce all the e-mails that you have received with  
24 respect to Mark Broach?

25 A. Yes.

1 Q. And have you done that?

2 A. I believe I have, yes.

3 Q. And do you have any specific recollection of turning over  
4 an e-mail with findings about this EEO complaint?

5 A. You know, I may be confused with something else, but I  
6 believe I turned over everything.

7 Q. You've received EEO training through the course of your  
8 work as a captain; right?

9 A. If I did, it was quite a while back.

10 Q. Well, you know not to discriminate based on race.

11 A. I was raised that way.

12 Q. And you also know it because you manage people consistent  
13 with that principle; right?

14 A. Absolutely.

15 Q. And you know not to retaliate against an employee who  
16 engages in protected activity; right?

17 A. I do not retaliate.

18 Q. My question was: You know not to retaliate; right?

19 A. Yes.

20 Q. And you know that filing a charge is protected activity;  
21 right?

22 A. Explain yourself.

23 Q. Well, when a man or a woman files a charge alleging that  
24 Kevin Campbell has discriminated against me based on my race,  
25 you know that just making that charge is protected activity;

1 right?

2 A. Okay. Sure. Sure. I see.

3 Q. And even if you're really upset by that, it's still --

4 A. Yes. I understand that completely.

5 Q. -- protected activity; right?

6 A. Yes, absolutely.

7 Q. All right. And you know that when that charging party  
8 cooperates in the processing of the charge by going to  
9 meetings and talking with people about the charge, that's also  
10 protected activity; right?

11 A. Yes.

12 Q. And you know that the City EEO process that Lisa Berning  
13 was involved with and that you were involved with, that that's  
14 all voluntary; right?

15 A. I don't know if it's voluntary or not. I truly don't. I  
16 don't know what -- that's my first involvement with them, and  
17 I'm not sure how that all works. I still don't. I mean, to  
18 be -- to answer your question correctly, I don't know. I  
19 don't know if it's voluntary or not. I was told to go, so I  
20 went.

21 Q. Okay. And so you really have no idea whether Lieutenant  
22 Broach was there voluntarily or whether he had been ordered to  
23 be there; right?

24 A. Yeah. I don't know, no.

25 Q. Now, at the end of your session on October 13th you

1 entered into an agreement, which is Joint Exhibit 12, with  
2 Mark Broach; right?

3 A. Yes.

4 Q. And that was written out by Lisa Berning; right?

5 A. That's correct.

6 Q. And the first paragraph basically says that Mark Broach  
7 will review with you any proposed discipline he has of Ron  
8 Evans; right?

9 A. Yes.

10 Q. And the second paragraph says, that you, Captain Campbell,  
11 when you become aware of problems with Ron Evans, that you'll  
12 review those with Mark Broach so that you both have a chance  
13 to be heard --

14 A. Sure.

15 Q. -- before you both proceed; right?

16 A. That's correct.

17 Q. And then the third paragraph, you're going to do this with  
18 respect to other people as well; right?

19 A. Yes.

20 Q. And then you signed it, and that's your signature on the  
21 left?

22 A. That's correct.

23 Q. And Mark Broach signed it, and that's his signature on the  
24 right?

25 A. That's correct.

1 Q. And you signed it in good faith; right?

2 A. Yes, sir.

3 Q. And you were satisfied that at least you'd give this a  
4 shot and implement this agreement when you ended the session  
5 on October 13; right?

6 A. I believe it's how it's always should have been.

7 Q. Okay. So when you finished, you thought you had  
8 accomplished something; right?

9 A. I thought Lieutenant Broach was going to run his unit and  
10 take care of his business, absolutely.

11 Q. And that you would cooperate with him as it says in the  
12 agreement; right?

13 A. That's correct.

14 Q. Now, between October 13th and October 19th you didn't have  
15 any problems with Lieutenant Broach; right?

16 A. No.

17 Q. There wasn't any crisis on his unit; right?

18 A. Not that I recall.

19 Q. There wasn't any allegation of impropriety or bizarre  
20 behavior; right?

21 A. No.

22 Q. And there wasn't even anything that happened that caused  
23 you two to consult pursuant to the terms of the agreement;  
24 right?

25 A. I'm sorry? Say again?

1 Q. I mean, there wasn't even any event that triggered a  
2 consultation under this agreement; right?

3 A. Well, the event was --

4 Q. Between October 13th when you signed it and October 19.

5 A. Well, we were supposed to -- the whole idea of the meeting  
6 was to work out a working environment between the two of us.

7 Q. Right. But, I mean, nothing happened pursuant to that  
8 agreement after October 13th and before October 19th; right?

9 A. Not that -- I'm not quite following you, but --

10 Q. You didn't have any new meetings?

11 A. No. No.

12 Q. No consultations about Ron Evans?

13 A. No.

14 Q. He didn't bring you any problems?

15 A. No.

16 Q. You didn't bring him any problems?

17 A. No.

18 Q. Quiet; right?

19 A. Yes, sir.

20 Q. And then you get this e-mail, which is Plaintiff's Exhibit  
21 33, from Lisa Berning saying, "Please look this over and  
22 provide me with your comments and suggestions. Once you have  
23 had a chance to review, I will share this with the chief,"  
24 meaning the fire chief; right?

25 A. Say again?

1 Q. You got this e-mail from Lisa Berning on Friday, October  
2 15th; right?

3 A. Yes.

4 Q. And your response is at the top; right?

5 A. That's correct.

6 Q. And attached to the e-mail was this document about  
7 Lieutenant Mark Broach; right?

8 A. Okay.

9 Q. Is that correct?

10 A. I believe so.

11 Q. Well, take a look. Be sure.

12 A. I'm looking right now.

13 Q. All right.

14 A. I believe that was attached.

15 Q. All right. So you understood that she was proposing that  
16 Mark Broach be referred for fitness-for-duty.

17 A. Okay.

18 Q. Is that correct?

19 A. Let's say yes at that point.

20 Q. All right. And so you responded talking about his  
21 inability to take responsibility and lack of integrity, as it  
22 says in your e-mail; right?

23 A. That's correct.

24 Q. And you also said that he lacked truthfulness, inability  
25 to grasp reality, and that he had created a level of concern

1 for the potential for workplace violence; right?

2 A. That's correct.

3 Q. Now, is this the same guy that you signed this agreement  
4 with six days earlier?

5 A. Same guy I sat in those meetings with, absolutely.

6 Q. Is it the same man you signed this agreement with  
7 (indicating)?

8 A. Yes, it is.

9 Q. And nothing that had been done in any of his prior  
10 discipline suggested workplace violence; right?

11 A. In his prior discipline from me, that's correct.

12 Q. All right. And at the end of your session on the 13th,  
13 you thought he was capable of being a partner with you in this  
14 agreement, Joint Exhibit 12; right?

15 A. Yes.

16 Q. And yet when you had an opportunity from Lisa Berning to  
17 attack Mark Broach and suggest that he's going to shoot up a  
18 firehouse, you did it; right?

19 A. I didn't say shoot up a firehouse.

20 Q. You said workplace --

21 A. What I said is what exactly happened.

22 Q. You said "workplace violence" --

23 A. I said exactly what happened. I was very concerned about  
24 that, absolutely. And that's October 17th. Wasn't the second  
25 meeting on the 16th?

1 Q. No.

2 A. Well, I'm confused. The 13th was --

3 Q. But he had done --

4 A. Let me clarify something.

5 Q. Hold on. Hold on. He had done nothing between the 13th  
6 and the 17th when you wrote this to suggest that he was going  
7 to engage in workplace violence; right?

8 A. Well, what concerned --

9 Q. Is that true or not?

10 A. Between --

11 Q. Hold on.

12 A. Okay.

13 Q. Just say yes or no. Had he done anything to suggest that  
14 he was going to engage in workplace violence?

15 A. No.

16 Q. Okay. There was testimony earlier --

17 (Mr. Gerhardstein and Mr. Giglio confer privately.)

18 MR. GERHARDSTEIN: I'm sorry, Judge.

19 THE COURT: That's okay.

20 Q. You were asked questions about an e-mail earlier in your  
21 testimony. It's Defense Exhibit 1. Do you remember that?

22 A. Yes.

23 Q. And I think we established that this e-mail was taken from  
24 Mark Broach's e-mail mailbox; right?

25 A. Yes.

1 Q. Okay. And this means, if I understand Outlook correctly,  
2 or whatever version of software you have, that you sent this  
3 e-mail to Mark Broach on June 13th, 2007; right?

4 A. That's correct. Uh-huh. Right.

5 Q. Okay. So when you were testifying, you said that Defense  
6 Exhibit 2 was attached because it says -- well, Defense  
7 Exhibit 1 shows this paperclip icon; right? Is that why you  
8 thought Defense Exhibit 2 was attached?

9 A. It just looked different from what I had seen before in  
10 deposition.

11 Q. And this is Defense Exhibit 2; right?

12 A. I don't know.

13 Q. I'm sorry.

14 A. Okay. Do I have it here to look at?

15 Q. Yeah. It's in the defense book. It would be number two.  
16 My question is very simple.

17 A. Okay.

18 Q. If the e-mail that you're talking about as Defense Exhibit  
19 1 was sent on June 13, 2007 --

20 A. Yes.

21 Q. -- it wouldn't have attached a report, performance  
22 evaluation signed by Ron Evans on April 1, 2007, would it?

23 A. Surely, because they are all dated April 1.

24 Q. Well, but if it's already signed, then this whole e-mail  
25 about how he could change it wouldn't make any sense, would

1 it?

2 A. Maybe in your eyes, but that's not what happened.

3 Q. Okay. So Ron Evans had already signed off?

4 A. I assumed he had.

5 Q. That's kind of unusual, though; right?

6 A. No, not really. I mean, they are supposed to go out on  
7 the 1st of April, and that's -- you know, a lot of times they  
8 are just dated April 1 because that's the cut-off date, I  
9 believe.

10 Q. So to get back to the joint agreement that you entered  
11 into with Mr. Broach on October 13, 2010, did you ever talk to  
12 Lisa Berning about whether you really would implement that  
13 agreement?

14 A. Well, sure. That's what -- we both signed off on it and  
15 --

16 Q. Well, don't you think that you just signed the agreement  
17 in order to buy a little time so that you could get Mark  
18 Broach off the Fire Department?

19 A. That's ridiculous, and I'll tell you why it's ridiculous.  
20 I signed this agreement because I believed --

21 Q. I'm sorry. Tell your counsel.

22 MR. GERHARDSTEIN: No further questions.

23 THE COURT: Thank you.

24 Redirect?

25 MR. GIGLIO: Thank you.

## 1 REDIRECT EXAMINATION

2 BY MR. GIGLIO:

3 Q. A few questions raised on cross I think I would like to  
4 have you explain.5 First of all, you were asked about being upset about EEO  
6 charges filed by Mr. Broach and Mr. Evans. Do you remember  
7 that question?

8 A. Yes.

9 Q. All right. And the ones that you related to earlier by  
10 Mr. Evans was back in 2005 or 2007; is that correct?

11 A. 2005, I believe, uh-huh.

12 Q. All right. Was either Mark Broach or Ron Evans under your  
13 command in February of '10 or March of '10 from then on? In  
14 other words, were you their commander in February of '10 for  
15 Ron Evans?

16 A. Was I their commander?

17 Q. Were you at 34s --

18 A. No. No. I didn't come back to 34s until March.

19 Q. Okay. When you came back in March, was Mr. Broach there?

20 A. Well, he was assigned there, but I never really saw Mark  
21 again.22 Q. Okay. Did you have any contact with Mark Broach after you  
23 came back to the 34s?24 A. We had the meetings with Lisa. Am I getting confused on  
25 times here?

1 Q. Yeah. Let me back you up. There's a lot of dates here.

2 A. Where --

3 Q. Okay. I'm going to give you 2010. We'll start with the  
4 year. Okay?

5 A. Okay.

6 Q. You testified that you left the 34s, and you were gone at  
7 least January, February, came back in March of '10; am I  
8 right?

9 A. That's correct.

10 Q. All right. So you got that time.

11 A. Okay.

12 Q. From the time you came back in March of '10, was either  
13 Mr. Evans or Mr. Broach at the 34s?

14 A. They were assigned there.

15 Q. They were assigned there. Were they there physically?

16 A. Again, you'd have to check the -- they were gone so much,  
17 I couldn't tell you when they were there and when they  
18 weren't.

19 Q. Well, if I represented to you that Mr. Broach took off for  
20 stress on March 5, would you have any reason to doubt that?

21 A. No. I know he did take a stress leave.

22 Q. So if he took -- if, in fact, that occurred, would he have  
23 been there when you came back?

24 A. When you say "been there," he would have been assigned  
25 there. You mean physically there?

1 Q. Yeah.

2 A. No. No.

3 Q. Okay. And if Mr. Evans was off for stress or off for  
4 whatever reason and he wasn't working in February of '10 or  
5 thereafter when you came back, would you be his commander? He  
6 might be assigned there, but if he's not there would it depend  
7 on the records of the Fire Department if he was there or not,  
8 physically?

9 A. Yeah. I don't recall seeing those guys.

10 Q. All right. I'm not trying to -- I don't want to confuse  
11 you any more than you are.

12 You were asked about the anonymous e-mail to Chief Wright?

13 A. Chief Wright, yes.

14 Q. All right. And does Chief Wright -- as fire chief, does  
15 he have a lot of authority?

16 A. He is -- yes. He's the chief. He is the ultimate.

17 Q. Okay. And can Chief Wright contact people to do what he  
18 wants? Does he have to go through Internal to investigate  
19 anything?

20 A. Not anything, but he has an option to use Internal.

21 Q. He has an option.

22 A. Yes.

23 Q. Do you know what Chief Wright did when he received that  
24 e-mail?

25 A. Again, I didn't see that e-mail until, like, a month or

1 two ago. And, obviously, according to that, which you  
2 presented here, what was presented here, is that, you know, he  
3 sent that to District Chief Howard Reed, who was a District 1  
4 chief, and they had their own personal conversation about it.  
5 That's it. I mean, I don't know anything about that thing.

6 Q. Okay. Do you know if they did anything, if they called  
7 anybody, or what --

8 A. I have no clue.

9 Q. Okay. "Anonymous" is what it was worded; right?

10 A. Yes.

11 Q. Okay. Anonymous. I thought I had a question -- I'd  
12 rather go on to the questions that Mr. Gerhardstein talked  
13 about about the president of the Local 48.

14 A. Okay.

15 Q. Remember those questions? There was a question that he --  
16 there is a disparaging because of ranking, he is basically a  
17 roughneck. Do you remember that question?

18 A. Yes. And he made comment about I should ask Reggie  
19 Harper, which was -- the name was Reggie Hocker, who was the  
20 president of the Cincinnati African Firefighters Association  
21 who was representing Mark at that hearing as a union rep. I  
22 said, "Just don't rely on what I'm saying. Talk to him."

23 Q. I want to go back to what Mr. Gerhardstein raised about is  
24 there any favoritism because you're captain and there's a  
25 district chief because the union -- the union president was a

1 low-ranking individual. Do you remember those questions?

2 A. Yes.

3 Q. All right. In 2010, who was the president of  
4 International Firefighters Local 48?

5 A. In 2010, it would have been -- let's see, Matt Alter --  
6 Monahan, I believe.

7 Q. Is that Marc Monahan?

8 A. Yes.

9 Q. What's his rank?

10 A. He is a district chief.

11 Q. What was his rank back then?

12 A. Probably a captain.

13 Q. So he wasn't a roughneck?

14 A. No. No. I don't ever recall a roughneck ever being the  
15 president, but I'm sure they could.

16 Q. Well, you talked about entering into the agreement that  
17 was shown that you signed with Mr. Broach?

18 A. Yes.

19 Q. After that, you received the e-mail from Lisa Berning?

20 A. That's correct.

21 Q. Okay. I'm going to show that you e-mail again. It's  
22 Exhibit 33, Plaintiff Exhibit 33. I'll -- when you got this  
23 -- are you responding to her draft referral that she felt that  
24 somebody --

25 A. No. These were my concerns.

1 Q. No, no. I understand they were your concerns.

2 A. Okay.

3 Q. But did she ask you to look at her -- let's just see what  
4 it says. "Please look this over." What is she talking about?

5 A. She's talking about that draft.

6 Q. Okay. And that draft is a referral to PEAP?

7 A. I don't know. I don't know what she does. I don't know  
8 what that all entails. I just stressed my concerns there.

9 Q. Okay. This has been previously published. This is the  
10 document -- is that the document that you understand was being  
11 attached for you to look at?

12 A. Yes.

13 Q. All right. She is issuing a mandatory PEAP. Do you see  
14 that?

15 A. Okay.

16 THE COURT: Can you state the exhibit number for  
17 that, please?

18 MR. GIGLIO: Which one is that? I believe it's all  
19 part of Plaintiff's 33.

20 MR. GERHARDSTEIN: Plaintiff's 33.

21 MR. GIGLIO: I'm sorry, Your Honor.

22 THE COURT: That's all right.

23 A. Again, this is her recommendations. I have nothing  
24 outside my two observations.

25 Q. Okay.

1 A. It came out of those meetings.

2 Q. Okay. All right. And you were asked about an e-mail,  
3 which I'm going to show you, PX-33, that you sent back.

4 A. Yes.

5 Q. And this was your input?

6 A. Yes.

7 Q. All right. Is there anywhere in there that says I'm not  
8 going to go along with the agreement to try to work with him?

9 A. No.

10 Q. Is this a distinct situation? Are you giving her any  
11 information regarding your comments about what occurred?

12 A. It's my concern, is what's detailed there: things we had  
13 discussed on the tapes; his inability to take responsibility  
14 for his own action; his lack of integrity.

15 And, I mean, the thing with Jeff Harris, I don't recall  
16 when that information was brought to me. It may have been  
17 brought to me during that week, but it was recent. It was  
18 within the last --

19 MR. GERHARDSTEIN: Objection, Your Honor.

20 THE WITNESS: Okay.

21 THE COURT: Do you want a sidebar?

22 MR. GIGLIO: I'm not going to go there.

23 THE COURT: For the record, the objection is  
24 sustained.

25 Q. Just try to -- I know you want to explain a little bit

1 more, but we'll let you -- for purposes of our interchange --

2 A. Okay.

3 Q. Take a breath.

4 A. Got you. All right.

5 THE COURT: There's water if you want.

6 THE WITNESS: I'm fine.

7 Q. My question is, despite your comments which you observed  
8 that you were asked input on, did you intend not to honor the  
9 agreement?

10 A. No. I would have loved for that to have been the  
11 conclusion right there, that this -- we're going to follow  
12 this. And, you know --

13 Q. So even though you made these comments --

14 A. Uh-huh.

15 Q. -- you believe you still could have --

16 A. I would have tried.

17 Q. You still would have talked to him about --

18 A. I would have tried. Absolutely. I would have followed  
19 that to a tee. That's him running his unit.

20 MR. GIGLIO: If I may I have one moment, Your Honor?

21 (Mr. Giglio and Ms. Powell confer privately.)

22 MR. GIGLIO: I believe that's all the questions we  
23 have, Your Honor. Thank you.

24 THE COURT: Thank you.

25 Mr. Gerhardstein, do you have any additional questions?

## 1 RECROSS-EXAMINATION

2 BY MR. GERHARDSTEIN:

3 Q. You said in response to counsel's question that you were  
4 concerned about Lieutenant Broach's inability to take  
5 responsibility. Do you remember that?

6 A. Yes, sir.

7 Q. And your real problem is that on issues that have been  
8 resolved, like those three reprimands, he was still saying  
9 that he didn't think he was fairly treated; right?

10 A. That's correct. Yes, sir.

11 Q. And you know that sometimes people go through due process,  
12 get their sentence, get their judgment, and still disagree;  
13 right?

14 A. That's correct.

15 Q. That doesn't mean they're unfit for duty.

16 A. I never --

17 Q. Right?

18 A. That's not my conclusion.

19 Q. Okay.

20 A. I don't do that. Lisa Berning does it.

21 MR. GERHARDSTEIN: No further questions.

22 THE COURT: Thank you.

23 All right. At this time the jury may have the opportunity  
24 to ask questions of this witness. And if you could write down  
25 questions that you have, we will review them.

1       The jury will ask questions, I will read them to you, and  
2 then you'll answer them, and each attorney will have an  
3 opportunity to follow up.

4               THE WITNESS: Okay.

5               THE COURT: All right.

6       Could I see counsel, please.

7       SIDEBAR CONFERENCE

8               MR. GIGLIO: Can I -- one quick question?

9               THE COURT: Yes.

10              MR. GIGLIO: Can my client leave the room when we do  
11 this to use the restroom?

12              THE COURT: Yes.

13              MR. GIGLIO: I'll tell him to start without me.

14              THE COURT: Okay. Number one --

15              MR. GIGLIO: Back on the record.

16              MR. GERHARDSTEIN: It's your witness.

17              THE COURT: Okay. "When you signed the agreement,  
18 why, when you got the e-mail from Lisa Berning, why didn't you  
19 suggest trying the agreement before going through with any  
20 further steps if you believe what you signed?"

21              MR. GERHARDSTEIN: This is why this so difficult for  
22 trial attorneys. These open-ended questions drive me crazy.  
23 All right.

24              THE COURT: Number two. "Prior to becoming a  
25 lieutenant, did you ever have any racial problems with your

1 peers?"

2 MR. GERHARDSTEIN: No objection.

3 MR. GIGLIO: No objection.

4 THE COURT: "As a lieutenant and captain, have you  
5 ever reported to an African American supervisor?"

6 MR. GERHARDSTEIN: No objection.

7 MR. GIGLIO: No.

8 THE COURT: "How were you aware of performance  
9 evaluations for Ron Evans would be in Lieutenant Broach's  
10 locker?"

11 MR. GERHARDSTEIN: No objection.

12 MR. GIGLIO: No objection.

13 THE COURT: The fourth set of questions.

14 "Why do you feel the African Americans at Engine 34 asked  
15 you to come back to the unit?"

16 MR. GERHARDSTEIN: This is a direct appeal to  
17 hearsay.

18 MS. POWELL: No objection.

19 MR. GERHARDSTEIN: Well, we object, I mean, because  
20 it's just going to be a speech about things people told him.  
21 So we object.

22 MS. POWELL: You could phrase it without giving his  
23 direct quotes: What is your understanding?

24 MR. GERHARDSTEIN: Well, he's already volunteered  
25 that anyway. I just think that you can't do it without asking

## JUROR QUESTIONS

1 for hearsay.

2 THE COURT: Let's go back to number three and talk  
3 about that for a minute. That's going to be our same problem.

4 "How long were you aware the performance evaluations for  
5 Ron Evans were in Lieutenant Broach's locker?"

6 MS. POWELL: He already said --

7 MR. GERHARDSTEIN: No --

8 MS. BRANCH: He said that he found something in his  
9 locker before. He already answered that --

10 MR. GERHARDSTEIN: Right. And these things were  
11 overdue, so I mean --

12 THE COURT: Okay. Well, I'll ask him how he feels,  
13 but if he starts to go into what other people told him, I will  
14 stop him. He could say, "I knew they liked me," but if he  
15 gets into hearsay, I'll cut him off.

16 "Why would someone in your company ever claim race  
17 discrimination before you asking them to motivate another team  
18 member to be great?"

19 MR. GIGLIO: I'm sorry, Your Honor, I missed that  
20 one.

21 THE COURT: "Why would someone in your company ever  
22 claim race discrimination for you asking them to motivate  
23 another team member to be great?"

24 MS. POWELL: No objection.

25 MR. GERHARDSTEIN: I think it's just asking for his

1 speculation. I think if counsel asked that question, it would  
2 be objectionable. That is not appropriate. I think it's just  
3 such an invitation to hearsay, and we object.

4 THE COURT: Okay. And I'm not asking that because he  
5 can't testify to what other people in his company would let  
6 him do.

7 "How many African American immediate supervisors have you  
8 ever had with the City?"

9 MS. POWELL: He kind of already --

10 THE COURT: Which he asked that one already. Okay.

11 "Has there ever been damage to a fire truck that went  
12 initially unreported? If so, when found, was that person  
13 black or white? And were they reprimanded?"

14 MR. GERHARDSTEIN: No objection.

15 MS. POWELL: No objection.

16 MS. BRANCH: Can we go back? You struck the prior  
17 question about supervision --

18 THE COURT: Yes.

19 MS. BRANCH: -- but I think the earlier question was:  
20 As a lieutenant or a captain, did you report to an African  
21 American?

22 So maybe this makes it broader?

23 THE COURT: Why don't I strike the number two and ask  
24 this one instead?

25 MS. POWELL: That makes sense.

## JUROR QUESTIONS

1 MS. BRANCH: Okay.

2 THE COURT: So any objection to the fire truck  
3 damage?

4 MR. GERHARDSTEIN: No.

5 MR. GIGLIO: No.

6 THE COURT: "What was the ratio of black to white  
7 firefighters at Engine 34 in March of 2010?"

8 MR. GIGLIO: That's fine.

9 MR. GERHARDSTEIN: No objection.

10 THE COURT: "Have any other African American  
11 firefighters at Engine 34 ever expressed concerns about  
12 working with Mark Broach? If so, can you elaborate?"

13 MS. POWELL: We don't object.

14 MR. GERHARDSTEIN: That's hearsay. That's just one  
15 set of rules here.

16 THE COURT: Okay.

17 MR. GIGLIO: You could ask if he was aware of any  
18 objections by anyone.

19 THE COURT: I'm just going to ask it as a yes or no  
20 question and not read the "elaborate" part.

21 And then the last question on this page, "Can the jury be  
22 made aware of who brought up the reprimands in the four  
23 meetings?" Which we've gone over at least three times  
24 already, but --

25 MR. GIGLIO: Who brought up reprimands at the

1 meetings? There has been prior testimony --

2 MR. GERHARDSTEIN: Are you going to offer the  
3 transcripts?

4 MR. GIGLIO: Yes. We're going to offer the  
5 transcript and the audio. We were going to play the audio,  
6 Your Honor. And, frankly, it's been a very good jury. We  
7 don't -- we're not here to punish anybody, but we want them to  
8 have the opportunity to listen to it and certainly read the  
9 transcript.

10 MR. GERHARDSTEIN: We're not going to object to the  
11 transcripts, so the answer to the question is you go check  
12 that out in the transcripts.

13 We are going to object to the audio just because nobody  
14 has used it and it's very hard to -- it could be very  
15 confusing without some guidance. He comes off booming because  
16 his mike is right next to his body, but I think the transcript  
17 solves the problems.

18 MR. GIGLIO: If that's the case, then they may have  
19 to play the transcripts.

20 MS. POWELL: We will need -- maybe it's not for this  
21 portion of the jury questions, but we will need to have a  
22 discussion about that at some point.

23 MR. GIGLIO: Well --

24 THE COURT: Well, let's have it now because we're --

25 MR. GIGLIO: I think we're certainly going to move

1    them in, the audio as well as the -- we think the audio is  
2    very, very important here because both sides have argued how  
3    this whole -- how this thing came about. Plaintiff has argued  
4    he didn't get his fair share, fair shake. Defense has argued  
5    we are asking multiple times. I think the jury should  
6    actually hear the voices of these people, the tone, their  
7    demeanor that goes -- it's the best evidence, frankly.

8           MS. POWELL: We could consider a stipulation about  
9    where the mike was. I mean, that's fine.

10          MR. GIGLIO: Yes. There's nothing wrong with that.

11          MR. GERHARDSTEIN: I just think you're inviting a  
12    long period of deliberations about something they have no  
13    guidance in. The transcript is neutral. It solves the  
14    problem. We've both used it. No one has used the audio. And  
15    without that, I would object to the use of the audio. I just  
16    don't think there is any framework within which to, you know,  
17    size it up.

18          MS. POWELL: I would just add that, from our  
19    perspective, it's kind of like when you hear about an e-mail  
20    being used in the wrong tone in an e-mail, it's the same  
21    thing. The transcript doesn't convey the tone and the cadence  
22    of the actual meeting and the pauses and the different  
23    people's voices, and it is the best evidence.

24          There is no reason why we should be treating them  
25    separately and only allowing the written document because it

## JUROR QUESTIONS

1 doesn't reflect all the things that I think we know impact how  
2 a conversation goes, which is how fast people are speaking,  
3 what level of pause and that kind of thing.

4 THE COURT: Okay. I have only looked at the  
5 transcript. I haven't listened to it, so I want to listen to  
6 it before I decide this. Why don't we take a break, and I  
7 will do that depending on how the rest of the day goes. But  
8 we need to address it before we lose the witness that we need  
9 to talk about because we won't be able to talk --

10 MR. GIGLIO: No. He wasn't there. Campbell can talk  
11 about it. Of course, the plaintiff could -- what we did ask  
12 specifically with Lieutenant Lemons and Captain Campbell,  
13 accurately went through the whole foundation scenario. We  
14 would not dismiss him if we were going to play it.

15 THE COURT: Okay. So back to this question. What do  
16 we want to do about the question?

17 MR. GERHARDSTEIN: I think you should just say that  
18 they'll have the record of the conversation. I think you can  
19 just answer it for them. They'll have the record of the  
20 conversation, and they'll be able to address that in their  
21 deliberations.

22 THE COURT: Okay.

23 This one made me laugh. "What is a roughneck?"

24 MS. POWELL: No objection.

25 MR. GERHARDSTEIN: No objection.

## JUROR QUESTIONS

1 THE COURT: And, "Did you ever complete a performance  
2 evaluation for Lieutenant Broach or tell him how to score a  
3 firefighter?"

4 MR. GERHARDSTEIN: No objection.

5 MR. GIGLIO: I'm sorry. Try that again.

6 THE COURT: "Did you ever complete a performance  
7 evaluation for Lieutenant Broach or tell him how to score a  
8 firefighter?"

9 MS. POWELL: It's been asked and answered.

10 MR. GIGLIO: I asked him.

11 MR. GERHARDSTEIN: Right.

12 MS. POWELL: And he provided testimony to --

13 MR. GERHARDSTEIN: Well, they didn't get it. I think  
14 we should respect their --

15 THE COURT: Okay. As far as timing goes, it's 2:30.  
16 I missed what you said about giving -- you need Campbell to  
17 play the tape?

18 MR. GIGLIO: We would be done other than awaiting  
19 your ruling on the audio.

20 THE COURT: Are you going to call Winston?

21 MR. GIGLIO: We would call Winston next.

22 THE COURT: Okay. Do you have any rebuttal  
23 witnesses?

24 MR. GERHARDSTEIN: We have to decide it.

25 MS. BRANCH: Well, we have to wait until their close.

## JUROR QUESTIONS

1 THE COURT: All right. What are your thoughts on  
2 them playing the tape without the witness if we finish with  
3 Campbell and excuse him, or would you object and want Campbell  
4 to be here?

5 MR. GERHARDSTEIN: I think we should have a witness.

6 THE COURT: Okay. Then we're going to take a break  
7 so we can listen to it. I'll ask him these questions. Before  
8 you follow up, I'll take a break.

9 CONCLUSION OF SIDEBAR CONFERENCE

10 THE COURT: Okay. Captain Campbell, I have some  
11 questions that I'm going to ask you. Then after we conclude  
12 with these questions, I need to take a short break, so I will  
13 take that break. After that, the attorneys will have an  
14 opportunity to follow up with you. Okay?

15 THE WITNESS: Okay.

16 THE COURT: When you signed the agreement, why, when  
17 you got the e-mail from Lisa Berning, why didn't you suggest  
18 trying the agreement before going through with any further  
19 steps if you believed what you signed?

20 THE WITNESS: The -- I have nothing to do with HR and  
21 that process. You know, as far as the agreement, yes. If  
22 Mark Broach would stay on the company, that's the agreement we  
23 would have worked out. But the HR -- my understanding, this  
24 fit-for-duty and all that came out of the meetings that we had  
25 that are on the tapes, and her conclusions came from that. I

1 have nothing to do with that. I don't send somebody out for  
2 fitness-for-duty. I don't have that responsibility. That  
3 comes from HR.

4 THE COURT: Okay.

5 Prior to becoming a lieutenant, did you ever have any  
6 racial problem with your peers?

7 THE WITNESS: No. No.

8 THE COURT: How were you aware the performance  
9 evaluations for Ron Evans would be in Lieutenant Broach's  
10 locker?

11 THE WITNESS: I wasn't. We were guessing. The --  
12 because I had had issues with him earlier in the course of his  
13 assignment there at Engine 34, and we discussed that with  
14 inspections, different forms and paperwork was left in his  
15 locker. I had numerous discussions with him. I had no idea  
16 they were in there. It was just a guess.

17 THE COURT: Without telling us what other people may  
18 have told you, why do you feel the African Americans at Engine  
19 34 asked you to come back?

20 THE WITNESS: Because we were all brothers.

21 THE COURT: How many African American immediate  
22 supervisors have you had in your career with the City and the  
23 Fire Department?

24 THE WITNESS: As far as my immediate supervisors?  
25 Um, well, we're talking 32 years. I'm trying to remember back

## JUROR QUESTIONS

1 32 years.

2 As my immediate supervisor was African American? Well,  
3 the -- Bobby Wright, who eventually became the fire chief, was  
4 my immediate supervisor when I was with Ladder 19. And then  
5 there were -- that was -- I think that was the only immediate  
6 supervisor that I had directly over me.

7 THE COURT: Has there ever been damage to a fire  
8 truck that went initially unreported?

9 THE WITNESS: Yes. Yes.

10 THE COURT: When that was found, was that person  
11 black or white?

12 THE WITNESS: Oh, I have no clue. It's a procedure.  
13 I mean, that apparatus, the bumper was twisted up and --

14 THE COURT: I'm asking about just any --

15 THE WITNESS: Oh, okay.

16 THE COURT: -- other incident where a fire truck was  
17 damaged and went unreported.

18 THE WITNESS: I don't know, but it could have. Not  
19 in my house, though.

20 THE COURT: What was the ratio of black to white  
21 firefighters at Engine 34 in March of 2010?

22 THE WITNESS: There would have been 15 total  
23 firefighters and three paramedic supervisors. Those are all  
24 lieutenants. Those three lieutenants were African American.  
25 The five firefighters under my direct control were African

## JUROR QUESTIONS

1 American. On Unit One, until when Lieutenant Lopez was there,  
2 that was all African American, all five. And then under  
3 Lieutenant Broach, he had some six men assigned, so one or two  
4 Caucasians that were there. There was a driver -- let me back  
5 up. There was one Caucasian on Unit One, one on Unit Two,  
6 which was me, and then I think Lieutenant Broach had a couple  
7 Caucasians. Everyone else was African American.

8 THE COURT: Have any other African American  
9 firefighters at Engine 34 ever expressed concerns about  
10 working with Mark Broach, yes or no?

11 THE WITNESS: Oh, yes, absolutely.

12 THE COURT: All right.

13 The jury had asked the question can they be made aware of  
14 who brought up the reprimand in the four meetings. I just  
15 want to let you know that you will have a record of the  
16 conversation in your deliberation.

17 The next question is: What is a roughneck?

18 THE WITNESS: Oh, I'm sorry. A roughneck is a term  
19 for a firefighter, and unpromoted firefighter in the Fire  
20 Division.

21 THE COURT: Did you ever complete a performance  
22 evaluation for Lieutenant Broach or tell him how to score a  
23 firefighter?

24 THE WITNESS: Tell him how to score? I mean, what  
25 was presented up here is what happened. I sent him an e-mail,

1 and in 2007 -- I remembered that. You know, I was thinking  
2 about that after the conversation, you know.

3 Ron Evans was on an extended leave when -- or when  
4 Lieutenant Broach first came up to the house. That was part  
5 of the reason why he asked me. He said, "I don't have much  
6 background with this guy."

7 So I sent him the e-mail, which -- and I copied all the  
8 district supervisors. I expressly said at the end, you know,  
9 "Bottom line, this rests with you. If you're not comfortable  
10 with it, change anything."

11 But I did send him that. That was 2007 for the 2006  
12 evaluation.

13 THE COURT: Did you ever complete a performance  
14 evaluation for Lieutenant Broach?

15 THE WITNESS: Did I ever do one for him? I did --

16 THE COURT: Yeah, answer that question. I'm not sure  
17 that was the question the jury asked, but you can answer that.

18 THE WITNESS: I was responsible for his performance  
19 report and for the other African American officer on Unit One,  
20 his performance report, and then, of course, everyone under my  
21 immediate command.

22 THE COURT: All right.

23 We're going to take a short recess. I'm going to say 15  
24 minutes. I'll try to keep it to 15 minutes if I can.

25 The same instruction as I gave you previously. Do not

1 discuss this case with anyone, including your fellow jurors,  
2 members of your family, or people involved in the trial or  
3 anyone else. If anyone tries to contact you or talk to you  
4 about this, please let us know immediately. Do not watch,  
5 listen or read any news reports of the trial. Do not get on  
6 the Internet or use blogs or chat rooms to research or discuss  
7 the case or any other social media applications. Finally, you  
8 must keep an open mind until all the evidence has been  
9 received and you have heard the views of your fellow jurors  
10 during deliberations.

11 (Jury out at 2:45 p.m.)

12 THE COURT: Okay. We'll take a short recess, and I  
13 will be right back.

14 (A recess was taken from 2:45 p.m. until 3:00 p.m.)

15 BEFORE THE COURT

16 THE COURT: Okay. So let's go on the record for a  
17 minute before we bring the jury back.

18 Obviously I wasn't able to listen to the whole thing, but  
19 I listened to parts of both seven and eight, beginning and  
20 middle.

21 My view on the audio is that I think it should go back to  
22 the jury. Although plaintiff is closer to the microphone, the  
23 jury has already been told he secretly made it, so I think --  
24 if we can do a stipulation, they will know why that is. It  
25 does give the best evidence of what happened at those

1 meetings.

2 So they will be admitted. I am fine with defendant's plan  
3 to just move to admit them at the end of their case and not  
4 play them at this time to the jury.

5 MR. GIGLIO: That would be fine, Your Honor. In the  
6 interest of time economy, makes sense.

7 THE COURT: Okay.

8 Mr. Gerhardstein, would you like to make any objections  
9 for the record?

10 MR. GERHARDSTEIN: Well, we object, but that's okay.

11 THE COURT: All right. Are we ready to proceed then?  
12 We'll just do follow-up with Captain Campbell?

13 MR. GERHARDSTEIN: As far as a stipulation, let's  
14 work that out as part of the charge. You know, there's  
15 another stipulation that you're going to get the audio tape,  
16 the microphone was there. We'll come up with some language.

17 THE COURT: Okay.

18 MR. GERHARDSTEIN: Thank you, Judge.

19 THE COURT: All right. And we'll do the follow-up to  
20 my questions with Captain Campbell? Do you have follow-up?

21 MR. GERHARDSTEIN: No, I don't.

22 THE COURT: Do you have follow-up?

23 MR. GIGLIO: No, Your Honor.

24 THE COURT: Oh, okay. Well, then do you have any  
25 objection to me releasing Captain Campbell now and just

1 informing the jury that there were no follow-up questions?

2 MR. GERHARDSTEIN: No.

3 MR. GIGLIO: No objection.

4 THE COURT: Okay. We'll do that. Thank you.

5 Ms. Lahley, you can release Captain Campbell and we'll get  
6 the jury. Thank you.

7 COURTROOM DEPUTY: Yes.

8 (Pause in proceedings.)

9 (Jury in at 3:07 p.m.)

10 THE COURT: All right. Counsel did not have any  
11 follow-up questions for Captain Campbell.

12 So would defendants like to call their next witness,  
13 please.

14 MS. POWELL: Your Honor, the City calls Assistant  
15 Chief Roy Winston.

16 THE COURT: Thank you.

17 Mr. Winston, if you will please approach the stand and  
18 raise your right hand to be sworn.

19 (The witness was duly sworn by the courtroom deputy.)

20 THE WITNESS: I do.

21 ROY WINSTON

22 a witness herein, testified as follows:

23 DIRECT EXAMINATION

24 BY MS. POWELL:

25 Q. Chief Winston, would you state your full name for the

1 record.

2 A. It's Roy Edward Winston the Second.

3 Q. And your current position with the Fire Department?

4 A. I'm the Assistant Chief of Human Resources, also referred  
5 to at times as the Training and Personnel Bureau.

6 Q. And how long have you been the assistant chief for the HR  
7 Division?

8 A. Just a little over two years.

9 Q. Do you remember approximately when you started that  
10 position?

11 A. It was early August of 2011.

12 Q. How long have you been employed with the Fire Department?

13 A. Just a little over 25 years.

14 Q. And can you walk us through your employment history at the  
15 department in terms of different positions you've held and  
16 roles that you've held at the Fire Department?

17 A. Sure. Came in the department in August of 1988. After  
18 graduating from drill school, went on to the west side of  
19 town, was sent over to the 24s, the 35s and the 17s,  
20 firehouses over Price Hill, Westwood and Lower Price Hill.  
21 Then went up to -- spent some time in Corryville at Engine 19,  
22 a couple of years there. Then I was promoted to lieutenant  
23 from there in 1993. I served as a lieutenant for a few years,  
24 finally got a regular position there at Engine 9, which is in  
25 North Avondale. I was promoted to captain I think sometime in

1 '96, I think it was. I started out down in Lower Price Hill  
2 and then eventually spent the rest of my time as a captain  
3 there in Carthage.

4 In 1999, I was promoted to a district chief over to the  
5 east side of town there this District 4. Approximately early  
6 2003, took the assignment of communications district chief  
7 which oversaw the Fire Department's 911 portion of the 911  
8 center, all the technology that's associated with the Fire  
9 Department.

10 Early 2011, went down to District 1 which is down at Ninth  
11 and Broadway, spent those seven, eight months until I got  
12 promoted to assistant chief in 2011.

13 Q. And can you explain your general duties that you performed  
14 as the assistant chief in the HR Division?

15 A. I was -- Operations is really responsible for all the  
16 people in the Fire Department. Human Resources is just really  
17 responsible for the actual processing of those individuals.  
18 So we have --

19 Really, it's made up of two divisions, the Training side  
20 as well as the Health, Safety and Risk Management side. On  
21 the Training side, we're ultimately responsible for all the  
22 certifications that people have from the day that they come on  
23 to the department up until they retire. So whether it's your  
24 CPR, EMT, firefighter, we're tasked with trying to make sure  
25 that those are not only up to date but that people have the

1 training that, you know, if the state were to come in and look  
2 at our records, that everyone would be up to par as far as  
3 what the state requirements are.

4 So within the Training, we also have the Media Team, we  
5 have our Recruiting, Background Investigations, which is all  
6 the backgrounds that's done on new employees as well as -- I  
7 spoke to the recruiting. So those are the primary functions,  
8 primary duties that Training has.

9 Then on the other side, we have the Health and Safety as  
10 well as Risk Management, which is responsible for processing,  
11 you know, all the Workmans' Comp claims, any injuries,  
12 accidents, the investigation arm of that, the line of duty  
13 deaths as well as the safety captains that perform -- on each  
14 entity in the city, we send one Safety captain to those,  
15 whether it be a fire, entrapment. Any high risk type of  
16 incident, those Safety captains actually respond to make sure  
17 our members are doing what they should on an incident scene.

18 We also have Internal Investigations, which is also under  
19 that, which is tasked with investigating certain complaints,  
20 certain violations of procedure that, you know, that we as  
21 Administration may give them or task them with.

22 Q. Okay. So we heard testimony earlier this morning from  
23 Lieutenant Lemons, and he is in the Internal Investigations  
24 section or subsection of your department; right?

25 A. Yes.

1 Q. He did talk, if you remember, about training; is that  
2 right?

3 A. Yes.

4 Q. So why -- if Lieutenant Lemons is in Investigations, why  
5 is he doing certain training when you have the Training side  
6 of your department?

7 A. I think sometimes with Internal, we usually look at them  
8 as people who walk around with trench coats, you know, peeking  
9 around corners and so forth. So one of the things I did when  
10 I became the assistant chief was to try to maybe broaden the  
11 scope of what they did, so we created this --

12 The chief wanted some kind of officer development program,  
13 so we came up with this mentoring program. We noticed that a  
14 lot of the disciplinary actions that were being taken probably  
15 weren't handled in the best way, so Internal was tasked to go  
16 out and mentor the newer lieutenants, the newer captains,  
17 really helping them appreciate not only what's in the  
18 procedures manual but really how to make practical  
19 application, when the time comes, within the firehouse  
20 setting.

21 Q. And were those efforts for mentoring and training, was  
22 that at all in response to the city's affirmative action  
23 numbers?

24 A. No. It didn't necessarily have anything to do with that,  
25 but we just thought it would be an effective tool to really

1 assist people to better handle interpersonal relations within  
2 the firehouse and really, hopefully, ultimately cut down on  
3 some of the disciplinary problems that we've seen in past  
4 years.

5 Q. And just to make sure that the jury is clear, who were  
6 your predecessors in your role as assistant chief of HR?

7 A. When I took over for Human Resources, I relieved Robert  
8 Kuhn who -- and before him it had been Mose Demasi.

9 Q. Okay. Do you know the plaintiff, Lieutenant Broach?

10 A. Yes.

11 Q. And how do you know him?

12 A. We actually -- 25 years ago, we actually came in the same  
13 recruit class.

14 Q. Do you ever make fires together?

15 A. We made a few. Sometimes memory gets foggy, but I think  
16 when I was the captain out in Carthage, he was assigned to the  
17 firehouse in North Avondale. So we were, you might say,  
18 neighbors, if you would. So that was -- I do recall making  
19 certainly incidents with him. I can't remember how long of a  
20 period it was, but it was for a couple of years.

21 Q. And did you -- when you started as the assistant chief in  
22 the HR Division, did Lieutenant Broach's name come to your  
23 attention?

24 A. Yes. Probably maybe a month or maybe a little less into  
25 the new assignment, Chief Burkert, who works under me there in

1 Risk Management, Health and Safety, mentioned that -- I guess  
2 we were reviewing the people who had been off the track for  
3 six months or longer. We were talking about creating an  
4 options letter that would -- those individuals, whether they  
5 be on limited duty, which is our light duty status that we  
6 have, or if they were just off the track, period, we would  
7 maybe reach out to send them these option letters.

8 Well, at that time he brought up the fact that Lieutenant  
9 Broach had been off for -- maybe since early in 2011, and he  
10 wasn't sure what he was supposed to do with that situation.

11 Q. And so what did you do to address that?

12 A. Well, I just asked him to, you know, see what had been  
13 done in the past as far as dealing with it, you know. So he  
14 went back and tried to speak, I think, with EHS and Risk  
15 Management just to see what the status of that was.

16 And I just -- at that time, I advised him "Hey, whatever  
17 help you need" in terms of trying to work on that situation,  
18 trying to see if he was willing to come back to work, to let's  
19 make that happen.

20 Q. Did you or Chief Burkert or anybody in your division take  
21 any follow-up steps to address Lieutenant Broach's current  
22 off-duty status?

23 A. He had mentioned that he was, you know, in the process of  
24 drafting a letter to try to send out to Lieutenant Broach or  
25 had sent some correspondence to the address as well as the

1 phone number, maybe, that we had on file with Lieutenant  
2 Broach. So we had taken some steps to try to send that, but  
3 it had come back as being undeliverable. I think it was Chief  
4 Demasi who actually approached me, I don't know, sometime  
5 maybe in September, and he mentioned that he had run into  
6 Lieutenant Broach at Winton Woods. So I mentioned that to  
7 Chief Burkert. Chief Demasi had what he thought was a current  
8 known phone number for Lieutenant Broach, and I asked Chief  
9 Burkert to see if he could use that contact information to  
10 reach him.

11 Q. Do you know if he was successful with that, if Chief  
12 Burkert was able to use that information to reach Lieutenant  
13 Broach?

14 A. I think so, only because I know when we finally drafted a  
15 letter that actually had my signature on it, he utilized  
16 Internal to actually deliver that ultimately to Lieutenant  
17 Broach.

18 Q. I'm going to have you turn to Joint Exhibit 18, Lieutenant  
19 Broach. Do you have that document in front of you?

20 A. Yes, ma'am.

21 Q. Do you recognize the document?

22 A. Yes.

23 Q. Is this a copy of the letter that your department sent out  
24 to Lieutenant Broach?

25 A. Yes, ma'am.

1 Q. Is this your signature at the bottom of the letter?

2 A. Yes, it is.

3 Q. Did you write this letter?

4 A. No. Chief Burkert did. He typed it, which happens from  
5 time to time. But at the same time -- but ultimately it's my  
6 letter because yes, I signed it.

7 Q. Did you review it before it went out?

8 A. Yes.

9 Q. Okay. Did you discuss it with Chief Burkert?

10 A. Yes, I did. I also discussed it with Chief Braun, who is  
11 our current fire chief.

12 Q. And is Chief Braun the fire chief that has succeeded Chief  
13 Wright?

14 A. Yes.

15 Q. What kind of things did you discuss with Chief Braun about  
16 the letter?

17 A. I just tried to give him an overview of what I knew at  
18 this point concerning why Lieutenant Broach had been off duty  
19 and, really, at the same time, what we were going to try to  
20 do, to try to see if he would comply in order to try to get  
21 him back to work. He was definitely agreeing with that.

22 Q. And what was your understanding of why Lieutenant Broach  
23 was still off duty?

24 A. The way it was explained to me was, there was an issue  
25 with some releases in the past, but it was almost -- I almost

1 felt that he was objecting to who from the Fire Department,  
2 the names on the Fire Department that were listed. I think  
3 originally at the time was our risk manager, which was -- had  
4 to have been Ron Texter. There have been other people who had  
5 problems with risk managers actually seeing, you know, their  
6 reports. So that name sometimes.

7 You know, I could see that, first, why people would maybe  
8 objected first or there would be some issues with that. So I  
9 thought it was maybe Ron Texter, or at least the way it was  
10 explained to me was it was Ron Texter that he was objecting  
11 to, not necessarily the Fire Department.

12 Q. Do you have any reason to think that Ron Texter was  
13 considered intimidating to fellow firefighters or people who  
14 were working through him to do a fitness-for-duty evaluation  
15 or people who were out on stress leave?

16 A. No. But I think the position itself, because that's when  
17 we -- when we medically separate or we separate someone, it is  
18 through that office that we do that. So if your job is on the  
19 line, so to speak, because you have some physical limitation,  
20 some kind of physical impairment, it's going to come out of  
21 that office. So I think, to some degree, you know, that --  
22 the office itself, just the name of the office could be  
23 somewhat intimidating to people.

24 Q. So you didn't have any concerns that Chief Texter was  
25 problematic in terms of his presentation to people?

1 A. No. I just think he had been in the job so long that he  
2 was just kind of known for that. That's all.

3 Q. Okay. So going back to this letter -- which it's fair to  
4 say you've seen it a little bit; right?

5 A. Yes.

6 Q. Okay. And there is -- the letter is dated October the  
7 18th, 2011. But if you go to the bottom paragraph, it talks  
8 about -- it indicates that unless Lieutenant Broach confirms  
9 his compliance for all the releases and an examination within  
10 three days, that it "will be cancelled and disciplinary action  
11 will proceed."

12 A. Yes.

13 Q. And what did you mean by that?

14 A. Well, I mean, I needed to get some movement on this  
15 situation. I think to some degree -- maybe my nature is I  
16 don't necessarily like loose ends, and I think this was, in my  
17 view, a loose end that was out there. So we -- I felt that we  
18 needed to get some movement, and we needed to have some  
19 action, really, on this particular situation or this  
20 particular matter.

21 I mentioned earlier, we send out options letters for  
22 people who have been out for more than six months. In that  
23 letter, we give you three days to contact us and set up an  
24 appointment to have a meeting for those five options that they  
25 will be given. And so -- but we do that to prevent, you know,

1 procrastination. And here we are, we are a paramilitary  
2 organization, and so -- and I think that's been discussed here  
3 quite through the trial. So when you get a direct order from  
4 one of your superiors, you know, usually timeliness is  
5 something that is of the essence. So that was why the three  
6 days was given in that case.

7 Q. Okay. In this case, did you get a signed release from  
8 Lieutenant Broach on October 21st?

9 A. I can't remember the exact date that we got the release,  
10 but yes, we did get the release signed by Lieutenant Broach.

11 Q. But you don't know if it met the deadline in your letter,  
12 do you?

13 A. No. I'm not positive, no.

14 Q. Okay. If I were to represent to you that a release was  
15 signed by Lieutenant Broach later in October, would you agree  
16 that doesn't meet your October 21st deadline?

17 A. I would agree.

18 Q. You didn't end up taking any disciplinary action against  
19 Lieutenant Broach as a result of this letter or what followed  
20 from it, did you?

21 A. No, ma'am, did not.

22 Q. Now, you had talked about sending out letters to other  
23 firefighters with a similar three-day deadline to bring them  
24 back to work; is that right?

25 A. Or at least to have a meeting to discuss their options on

1    them returning to work, yes.

2    Q.   And it sounded like -- you said that some of those  
3    firefighters were given the possible option of limited duty;  
4    is that right?

5    A.   No.   Some of them -- we give the same option to whether  
6    you're off the track, which means you're at home somewhere; or  
7    you could be on limited duty, which means you're working with  
8    us, you're just not on full unrestricted duty.

9    Q.   Okay.   I misunderstood.   Since you've been in the HR  
10   Division, who do you generally have listed on the medical  
11   releases for a psychological examination?

12   A.   Under normal situations, it's usually our Health and  
13   Safety District Chief, which is Chief Burkert.   Usually Local  
14   48 is on those releases, and then I think Employee Health  
15   Services, and then maybe the City's Risk Management Division,  
16   someone from there.

17   Q.   Are you sometimes on the releases?

18   A.   No.   This was actually the first one that I was on.

19   Q.   Talking about at this time with Lieutenant Broach?

20   A.   Yes, ma'am.

21   Q.   Can you -- your position is normally you don't include  
22   yourself on the releases; correct?

23   A.   No.   Only unless they need some assistance in trying to  
24   maybe mediate, if you will, who actually is on the release  
25   from the department.

1 Q. And why did you think or did you think having your name on  
2 the release for Lieutenant Broach would assist anything?

3 A. Well, as I mentioned, I thought maybe he was -- basically  
4 going the way it was told to me, I thought he was objecting to  
5 Chief Texter. And now, in this case, he had retired, so now  
6 Chief Burkert had actually assumed his assignment. So I  
7 thought it was the actual individual that he was objecting to.

8 So I thought, you know, based upon the history I had with  
9 Lieutenant Broach, that maybe if he saw my name on the release  
10 as the only person from the Fire Department that actually  
11 would see that, then, you know, maybe we could, you know,  
12 rectify the situation and actually have the evaluation done.

13 Q. Okay. And you said that usually you have the union on the  
14 release; correct?

15 A. Yes.

16 Q. Why is that?

17 A. Well, usually the union is the advocate, if you will, for  
18 the employee. So most people -- I mean, they are quick -- and  
19 that's who they want representing them in anything. So I  
20 think from, you know, anytime they are being opposed, if you  
21 will, by management, in every case that I've ever seen they  
22 always want Local 48 to be involved or to actually represent  
23 them in this process.

24 Q. Does the HR Division require the union, though, to be on  
25 any of these releases?

1 A. No. I think it became more just boilerplate just because  
2 it had been done so many times historically.

3 Q. Do you remember whether the union was listed on any of  
4 Lieutenant Broach's releases?

5 A. I think there became some issue that Chief Burkert  
6 mentioned to me where his name, Captain Ransick and Local 48  
7 was actually listed on one of the releases, yes.

8 Q. Okay.

9 MS. POWELL: Just one minute.

10 (Ms. Powell and Mr. Giglio confer privately.)

11 Q. I'm going to have you turn to the plaintiff's exhibit  
12 book. Are you there?

13 A. Yes, ma'am.

14 Q. Okay.

15 A. But I didn't see what exhibit you said.

16 Q. I did not. I'm sorry. Can you turn to Plaintiff's  
17 Exhibit 9?

18 A. Yes.

19 Q. Do you have that in front of you?

20 A. Yes, ma'am.

21 Q. So were you involved with -- this is the release that's  
22 used for the fit-for-duty evaluations; is that correct?

23 A. Yes.

24 Q. And are they prepared within your division or somewhere  
25 else?

1 A. I probably learned more so -- they are prepared within  
2 Risk Management for the City. So I think Employee Health,  
3 which is actually under that, I think they are prepared there.

4 Q. Okay. And were you involved at least in the information  
5 that went on this release?

6 A. Actually, Chief Burkert was handling the release at that  
7 time.

8 Q. And here it indicates that Local 48 was initially listed  
9 on the release. Do you know the circumstances of how that got  
10 crossed out?

11 A. At that time no, I did not.

12 Q. Okay. Why did you include all -- District Chief Burkert,  
13 yourself and Captain Ransick? Why did you put these three  
14 individuals?

15 A. Well, we all work in the same bureau. The only reason I  
16 could imagine that Chief Burkert actually included Captain  
17 Ransick -- when Chief Burkert is off on any kind of leave,  
18 Captain Ransick actually fills in his spot. So his job is to  
19 actually, you know, do the -- or the assigned duties of Chief  
20 Burkert when he's off duty. So maybe by including him there,  
21 he might have thought, you know, it may be something that he  
22 would have to handle possibly down the road.

23 Q. Okay. Since you've -- let me start by asking -- well,  
24 before you came to the HR Division, did you have any role with  
25 fit-for-duty evaluations?

1 A. No, never did prior to coming to HR.

2 Q. Since you've been in HR, you've learned a little bit more  
3 about fitness-for-duty evaluations?

4 A. Yes.

5 Q. What is your understanding of why the department and your  
6 division requires firefighters in certain instances to do a  
7 fitness-for-duty evaluation?

8 A. I think the root of it is really what we have been tasked  
9 with as a department. I mean, here we are entrusted with the  
10 safety of the community, but before we can really keep anybody  
11 else safe, I mean, we got to be safe ourselves. And so with  
12 that safety there comes a lot of split-second decision-making  
13 that has to be done so people have to be -- whether it's  
14 physically, emotionally, mentally, they have to be prepared to  
15 make those decisions.

16 So I think fitness-for-duty is just a tool that's used to  
17 make sure that individuals are really up to standard or up to  
18 par in order to make sure that our mission as a department can  
19 be carried out effectively.

20 Q. Since you've been in the HR Division, how many  
21 fitness-for-duty evaluation cases have you seen?

22 A. I think I've -- probably three. There's been three.

23 Q. And have they all been for psychological evaluations or  
24 for physical or for both?

25 A. For both. I think two were for physical, I believe, and

1 then one was for psychological.

2 Q. And one of those was for Lieutenant Broach, or is this  
3 separate --

4 A. No. This is separate from Lieutenant Broach.

5 Q. Can you -- without stating any names, can you identify the  
6 races of the three individuals referred through your  
7 department for a fitness-for-duty?

8 A. All three were Caucasian.

9 Q. Okay. And what is your position as the assistant chief of  
10 the HR Division in terms of receiving the full  
11 fitness-for-duty reports, evaluations?

12 A. It's really my position that we should receive the full  
13 report. Oftentimes, one of the conflicts that we run into,  
14 whether it be our own internal City doctor or any private  
15 physician, is that ultimately oftentimes they don't  
16 necessarily understand everything, the makeup of what we have  
17 to do with our job assignment. So my feeling is that, you  
18 know, having those full reports, we can better make decisions  
19 that other people can't.

20 Yes, they can let us know whether their physical ability  
21 is there or if they are actually fit for duty, but there could  
22 be some things in there that we might need to know that could  
23 jeopardize what we do on an everyday basis when it comes to  
24 operating safely in whatever environment that we're in.

25 Q. Okay. When you receive the physical fitness-for-duty

1 evaluations, how are they kept?

2 A. You said the physical ones?

3 Q. I'm sorry. When you receive the hard copies of an  
4 evaluation, whether it's for a physical or a psychological  
5 fitness-for-duty exam, you receive those -- the hard copies,  
6 the pages, what do you do with them?

7 A. I guess it depends on who gets them. If the release was  
8 to Chief Burkert, they would go in what we call the medical  
9 file. He maintains the medical file that we have at  
10 headquarters. It's a separate room. It's kept locked up.  
11 All the files are locked.

12 If they were released to me, in my office I have what we  
13 call the HR files. So even though he actually maintains the  
14 medical file, if the release was for me and me only, it would  
15 stay within that HR file which is in my office, which is also  
16 locked up in, and that file is locked as well.

17 So I guess the only access somebody could have is -- yeah,  
18 there is probably a spare key somewhere on this key ring that  
19 we have just in case I lock myself out of my office, which has  
20 happened before, but when it comes to those actual files, they  
21 are locked in there as well.

22 Q. Does every individual employee in the HR Division have  
23 access to that?

24 A. No. Just myself.

25 Q. What about -- do you know, what about for Chief Burkert's

1 files?

2 A. He is the only one that has access to that.

3 Q. Okay. Now, do you remember approximately when Lieutenant  
4 Broach's fitness-for-duty evaluation was completed?

5 A. I want to say it was late November, '11.

6 Q. 2011?

7 A. Yes, ma'am.

8 Q. Did you receive it in late November of 2011?

9 A. Yes.

10 Q. Okay. And when did Lieutenant Broach return to work?

11 A. Came back early February, like February 10 -- February  
12 12th, I think, 2012.

13 Q. Why did it take those months between November and  
14 February, late November, early mid-February to get Lieutenant  
15 Broach back to work?

16 A. I think there was just a series of discussions and  
17 meetings that needed to be had. I think -- first of all, this  
18 was the first time we had ever brought somebody back like  
19 this. Normally, when you come back to duty, it's -- Employee  
20 Health or with their collaboration with PEAP or something  
21 like, they are the ones that will clear someone. Then they  
22 present it to the Fire Department, and we work to bring them  
23 back.

24 In this case, this was pretty much handled more so within  
25 the department directly. So I think my initial discussion

1 maybe end of November, first of December was with Gus because  
2 I think at this point he was really -- Gus Giglio, which is  
3 the City attorney, he had been having a lot of correspondence  
4 with Lieutenant Broach's attorney and so I met with him --

5 Q. I'm going to stop you real quick just to caution you that  
6 anything that you discussed with Mr. Giglio is privileged, but  
7 you can continue to explain.

8 A. Okay. So yeah, that was the end of that. So we did talk,  
9 and we just went over, you know, next steps, if you will. So  
10 I think after that, the chief and I had a meeting. I  
11 explained to him there in that meeting that the report had  
12 come back, I had reviewed it, and that Lieutenant Broach was  
13 fit to return to duty. We kind of just discussed some of the  
14 things that we as a department may need to do in facilitating  
15 his return back to duty.

16 I think one of the suggestions that was put in there had  
17 to do with some type of counseling or so forth. So I asked  
18 Chief Burkert to research within the region, you know, what  
19 kind of counseling, interpersonal counseling was out there and  
20 get back to me, you know, give me a list of things, you know,  
21 and then at the same time cost and things that were associated  
22 with that.

23 I think it probably took him a couple of weeks to try to  
24 compile some of that. He presented it to me. Usually at the  
25 end of the year -- our fiscal calendar ends in December 31st,

1 or it used to at that time, was December 31st. And so usually  
2 -- at that point, I think overtime, we probably were over  
3 budget, if you will, so money is always an issue at the end of  
4 the year. So we had to take that into consideration as well.

5 I think around probably, I don't know, December,  
6 mid-December, late December, I went on vacation. I think  
7 Chief Braun usually always takes two weeks' vacation around  
8 that time. I don't think we probably didn't do anything with  
9 those options that Chief Burkert had given me. He had given  
10 me some for Xaiver. There was some at UD and a few other  
11 places. But even in my own mind I thought that the cost may  
12 be a little steep in terms of what they were providing us.

13 And so when I returned back from vacation early January, I  
14 met with two of my lieutenants who are actually in the  
15 Training Bureau. How we were going to -- in the meeting, what  
16 we discussed was treating Lieutenant Broach as someone that  
17 maybe had been on a long-term military deployment. Usually  
18 when our members are deployed into the military, we have this  
19 -- it's almost like some kind of checklist to make sure  
20 everything they might have missed during that period that they  
21 were out, they were tasked with the responsibility to figure  
22 out what it was and, at the same time, make sure that those  
23 things were gone over with him or he was allowed to review the  
24 material before he actually came back to full duty.

25 Q. Can you give some examples of everything that Lieutenant

1 Broach or someone who was out for an extended period had  
2 missed? What would that be?

3 A. I'm sure we had a lot of procedural changes during that  
4 time. I think -- if memory serves, they were actually out,  
5 had been training on a new device called a safety pad, which  
6 is a new electronic notebook that's used on medical runs.  
7 Well, that would have been something brand-new to him. You  
8 know, those types of items, anything new -- I think we might  
9 have had new masks at that point. He needed to go over the  
10 new self-contained breathing apparatus. And they had to make  
11 sure that he was proficient at being able to do that before he  
12 actually returned to full duty. We -- because when we brought  
13 him back, we were going to bring him back in a limited  
14 capacity so that he could review those items before returning  
15 to a fire company.

16 Q. Okay. And did you end up ever sending -- you didn't send  
17 Lieutenant Broach to counseling; correct?

18 A. I talked to City HR, told them what my options were, how  
19 much they cost, and I asked them did they have anything that  
20 would correspond to what we were looking for. A gentleman by  
21 the name of Tom Seward, who -- I don't necessarily know his  
22 title in HR. He was some kind of analyst there. He  
23 recommended a leadership course that they had for -- it was --  
24 I think it covered over four weeks. It was one day a week,  
25 and he thought that might meet some of the needs concerning

1 this interpersonal type of thing that we were looking for.

2 So that's what we -- the chief and I talked. We decided  
3 to send him to that instead of some outside agency or some  
4 outside counseling.

5 Q. Okay. Now, you heard the testimony from Chief Texter;  
6 right?

7 A. Yes.

8 Q. You've heard testimony from Chief Burkert?

9 A. Yes.

10 Q. And from Chief Demasi?

11 A. Yes.

12 Q. And possibly others. You've heard -- is it fair to say  
13 you've heard varying testimony about the HR Division's receipt  
14 of the full psychological evaluation report?

15 A. Yes.

16 Q. Okay. And your position is, though, that you need to  
17 receive the full report; correct?

18 A. Yes.

19 Q. Is that your understanding that Chief Texter required that  
20 as well?

21 A. Yes.

22 Q. Is it your understanding that Chief Burkert requires it?

23 A. Yes.

24 Q. Is it your understanding that Chief Kuhn required it?

25 A. I'm not necessarily sure what his requirements were.

1 Q. If there were any differing practices as it relates to the  
2 fitness-for-duty report, how would you explain that?

3 A. I think we all have different management styles, probably  
4 different philosophies. I mean, we have a lot of procedures  
5 and policies that are put in writing. But, at the same time,  
6 we don't have -- everything is not addressed in writing. And  
7 so there is some latitude from the management standpoint to  
8 make decisions that we think would be in the best interests of  
9 those management styles that we do have.

10 So I think with -- as it relates to seeing the full report  
11 or not seeing it, I think what you see is a difference in  
12 philosophy or a difference in management style.

13 Q. Okay. Have you ever handled or been asked to handle an  
14 anonymous complaint about someone in your tenure at the HR  
15 Division?

16 A. Yes. We got anonymous complaints all the time.

17 Q. Who do you get them from?

18 A. The majority of them -- let me back up. The majority of  
19 them appear to come from the public. But since they are  
20 anonymous, we don't necessarily know the actual source.

21 Q. Do these anonymous complaints, do they come directly to  
22 HR?

23 A. I probably receive very few. The majority of them usually  
24 come to Operations, which -- through their staff, or they come  
25 directly to Internal. The City also has an anonymous hotline

1 that they've set up. I don't really know how long it's been  
2 in existence, but occasionally we'll get a few from that  
3 hotline as well.

4 Q. Have you ever discussed how to handle anonymous complaints  
5 with your current chief, Chief Braun?

6 A. The chief -- Chief Braun originally comes from Columbus,  
7 Ohio, which is where he spent his entire career. In Columbus,  
8 it's part of their union contract that they don't investigate  
9 anonymous complaints. So, in essence, that's his culture. So  
10 no, he -- usually his direction, we'll explain to him what  
11 those anonymous complaints are. But since that's his culture,  
12 normally we do not -- I do not, in fact, have Internal  
13 investigate those anonymous complaints.

14 Q. Do you know what Chief Wright's practice was when he was  
15 in charge?

16 A. I knew -- in all cases with anonymous complaints, it's the  
17 chief's discretion how he wants to handle it. I did not work  
18 under Chief Wright in that capacity at that time, so how he  
19 handled I'm not positive.

20 Q. Okay. You heard some questions earlier about the City's  
21 and the Fire Department's discipline statistics; right?

22 A. Yes.

23 Q. And you heard testimony and saw documents relating to the  
24 City's affirmative action statistics?

25 A. Yes.

1 Q. Okay. Were you familiar with those before today?

2 A. Yes.

3 Q. How did you become familiar with them?

4 A. Part of -- one of my assignments within HR is to provide  
5 the data that the HR Department utilizes to come up with that  
6 report. So I usually have what's called our HR liaison run  
7 the statistics from the previous year and, in return, give it  
8 to me and I, in turn, give to the person that's working on  
9 that report for City HR.

10 Q. Do you ever share that data within your department or your  
11 division?

12 A. We share -- at the end of the day, we share the final  
13 report, yes.

14 Q. Do you ever ask any of your subordinate officers to do  
15 anything with that data?

16 A. No. Ultimately, I think that rests with me and maybe the  
17 chief. But no, we don't ask them to do anything with it.

18 Q. Does Lieutenant Lemons have any requirement to assess the  
19 department and citywide discipline numbers?

20 A. No. His job is in investigating, and that's pretty much  
21 what it is. But no, he has nothing to do with the statistical  
22 data that's collected.

23 Q. So you said that is -- you view that to be more of your  
24 job; correct?

25 A. Yes.

1 Q. What types of things have you done in your -- during your  
2 time at the HR Division to look at the City's and the Fire  
3 Department's discipline statistics and to identify and to  
4 decide what to do with that information?

5 A. I mean, I think one of the things that we looked at, we  
6 want to -- I mean, we are a diverse organization, but we want  
7 to do our best to maintain consistency and fairness across  
8 discipline. We recognize that disparity exists, and so our  
9 job is to try to make sure that we make that disparity  
10 decrease as much as possible.

11 I know one example -- I think we've talked about AWOL  
12 here, which is people who are late and they really don't have  
13 a reason for being late. That means they don't report -- they  
14 didn't make it to work at seven o'clock in the morning,  
15 usually, and they didn't call ahead. And so one of the things  
16 we found is that some individuals were giving people a verbal  
17 counseling for that, but yet at another firehouse -- and in  
18 particular, there was one firefighter who was African American  
19 and, in fact, he was Chief Wright's son, he was given a  
20 reprimand for that same incident.

21 And so one of the things that I did was mandated that all  
22 AWOLs will be sent to us. So, that way, a reprimand would be  
23 given across to everyone regardless of, you know, how late  
24 they were. I mean, late is late.

25 And so that was just one example of one of the things that

1 we tried to do to maybe make sure that discipline is a little  
2 more consistent, a little more fair. Officers have  
3 discretion, but at the same time, you know, if one person is  
4 being adversely treated over here for the same infraction, you  
5 know, it's our responsibility to make sure that discipline is  
6 applied evenly across the board.

7 MS. POWELL: Just one minute to confer with counsel?

8 THE COURT: Sure.

9 (Ms. Powell and Mr. Giglio confer privately.)

10 Q. Chief Winston, I'm going to have you go back to the Joint  
11 exhibit notebook. Do you have that in front of you?

12 A. Yes, ma'am.

13 Q. Can you look through this exhibit?

14 MS. BRANCH: What number?

15 MS. POWELL: I'm sorry. I keep doing that. Joint  
16 Exhibit 14.

17 A. Okay.

18 MS. BRANCH: We've been using PX-9.

19 MS. POWELL: One moment.

20 (All counsel confer privately.)

21 MS. BRANCH: One, two, four, six.

22 MS. POWELL: Okay. Seven, as well; is that correct?  
23 I have one, two, four, six, seven.

24 MS. BRANCH: Yes, it's seven.

25 MR. GERHARDSTEIN: Right.

1 MS. BRANCH: And not in evidence is page five.

2 BY MS. POWELL:

3 Q. Can you -- looking at Joint Exhibit 14, can you identify  
4 all the documents in that exhibit?

5 A. They are all the various releases that were put forth.

6 Q. And are those part of plaintiff's record at your office,  
7 do you know? Do you know whether these are Captain Lieutenant  
8 Broach's file at the HR Division?

9 A. No, they wouldn't be.

10 Q. Okay. To the best of your knowledge, are these releases  
11 true and accurate copies of the releases that were exchanged  
12 between the City and Lieutenant Broach?

13 MS. BRANCH: Objection as to the ones that  
14 pre-existed Chief Winston, his position. He has no  
15 foundation.

16 THE COURT: Counsel, that will be sustained unless  
17 you can lay the foundation.

18 MS. POWELL: I have no further questions.

19 THE COURT: Thank you.

20 CROSS-EXAMINATION

21 BY MS. BRANCH:

22 Q. Good afternoon, Chief Winston.

23 A. Good afternoon.

24 Q. You ended your testimony talking about the discipline  
25 reviews -- the review you did of the discipline at the City

1 based on data that you collected; is that right?

2 A. Yes.

3 Q. And one of the examples you used was different supervisors  
4 were using different standards and different types of  
5 discipline for the same offense, it being AWOL; is that right?

6 A. Yes.

7 Q. And the example you gave was that an African American was  
8 given a reprimand, and other firefighters were given simply  
9 verbal counseling, both of which committed the same offense,  
10 AWOL; is that right?

11 A. Yes.

12 Q. And those -- the firefighters who were AWOL who only got  
13 verbal counseling were some of those white firefighters?

14 A. The one example was a white firefighter, yes.

15 Q. Okay. So in addition to finding that there was disparate  
16 treatment of firefighters for the same offense, being AWOL,  
17 did you also look at the data to look at the racial impact of  
18 that? For example, in this situation both firefighters were  
19 AWOL, but the African Americans were given a written reprimand  
20 and the white person was given counseling.

21 A. You mean just in that example did I look at the racial  
22 makeup?

23 Q. Yes.

24 A. No. I mean, I just took one example; but, at the same  
25 time, I think it did cause me to want to dig a little further

1 to see -- but no, we didn't find any evidence that, yeah, this  
2 was a pervasive thing that was taking place.

3 But in this instance, yes, it was an African American that  
4 was treated harsher than a Caucasian firefighter.

5 Q. And I think you said when you started your testimony that  
6 there were some changes made and you had training implemented  
7 because discipline was not being handled the best way; is that  
8 right?

9 A. In some instances, yes.

10 Q. And part of what you were talking about is that different  
11 supervisors were using different standards for the same  
12 offense; right?

13 A. Yes. Even though people were being disciplined, it was a  
14 little less harsh or severe in certain cases, yes.

15 Q. And you thought that was unfair?

16 A. Yes.

17 Q. And that should be changed?

18 A. Absolutely.

19 Q. And in doing this analysis, have you also analyzed how  
20 that has impacted the firefighters based on race?

21 A. We have looked at that because we recognize that the  
22 numbers are disproportionate.

23 Q. Sure.

24 A. And so -- you know, we can't control all external  
25 influences, but as it relates to the Internal discipline

1 that's given, the chief and I have definitely collaborated to  
2 try to find ways in which we can just make sure that things  
3 are equitable across the board. I mean, we can't control  
4 people's behavior, but we can control how the discipline is  
5 measured out.

6 Q. So you and the chief are working on fixing this problem of  
7 racial disparity and discipline?

8 A. Doing our best, yes.

9 Q. Okay. And the racial disparity and discipline, has that  
10 existed for years before you even got into your position?

11 A. Oh, I'm sure it has.

12 Q. Have you ever been a victim of that yourself in the Fire  
13 Department?

14 A. No, not that I can -- not that I ever recall, no.

15 Q. Some of the numbers we looked at this morning, the one  
16 that stood out for me was 54 percent of the people receiving  
17 discipline in the protective services were African American  
18 males. Do you remember that testimony in that document?

19 A. Yes, ma'am.

20 Q. Is that one of the things that alerted you that there is a  
21 problem in the Fire Department about racial disparity and  
22 discipline?

23 A. I don't necessarily think it was that report because,  
24 naturally, a report ever goes -- we have our own internal  
25 systems that we run, and I think it was --

1 Q. So you were already aware of that data?

2 A. Yes, ma'am.

3 Q. Before that final report comes out from the City?

4 A. And the reason I don't think I looked at that is because  
5 that includes the Police Department as well. We're together  
6 in that. So I'm not going to say I don't care about the  
7 police, but when it comes to discipline I only really care  
8 about the Fire Department as far as that.

9 Q. And was that statistic, 54 percent of the discipline was  
10 disproportionate on African American males, was that the same  
11 percentage for Fire when you looked at --

12 A. I don't recall the number being that high, no. I don't  
13 recall what the number was, but it wasn't that outstanding.

14 Q. It was similar to -- the total number for all protective  
15 services was similar to what it is for Fire?

16 A. Well, I'm not absolutely sure, but it was higher than what  
17 I thought it should have been.

18 Q. So back when Mark Broach was being reprimanded, written  
19 reprimands by Captain Campbell in 2007, 2008 and 2009, would  
20 you agree that there was racial disparity in disciplining  
21 black firefighters?

22 A. I'm sure it's existed, yes.

23 Q. Now, you know that there had been an EEO complaint filed  
24 by Mark Broach in March of 2010; right?

25 A. Yes.

1 Q. And let me say -- when you took over your position two  
2 years ago in August of '11, you knew at that point that Mark  
3 Broach had filed an EEO charge against the City; right?

4 A. When I took over, no, not initially, no. But it was  
5 probably a few months into my new assignment, yes, I probably  
6 became aware.

7 Q. In that two months between August and October when the  
8 releases were getting signed, did you learn about it then?

9 A. I can't exactly say, but it was sometime in the fall, yes.

10 Q. All right. And that was something known to you and to the  
11 chief when you met with the chief to talk about these various  
12 things regarding Mark Broach?

13 A. Not that I'm aware of, no.

14 Q. There was also an EEO complaint filed by Ron Evans. You  
15 knew about that in the same fall of --

16 A. Yes.

17 Q. -- 2011; is that right?

18 A. Yes.

19 Q. And did you know that Mark Broach had already filed his  
20 EEOC charge in the fall of 2011?

21 A. No, I don't think I knew that initially.

22 Q. Were you aware of this lawsuit being filed in January of  
23 2012? That would be during that three-month period after he  
24 was declared fit but before he came back to work in February.

25 A. I think I did become aware sometime in January, yes.

1 Q. And when this lawsuit was filed, he was not yet back to  
2 work and on payroll; right?

3 A. No, not yet.

4 Q. It took another month or so for that to happen?

5 A. I think I met with him at the end of January, and we  
6 brought him in the next pay period.

7 Q. Now, you say that you met with Chief Braun to discuss the  
8 termination letter that you sent; right?

9 A. Yes, ma'am.

10 Q. And he approved that; is that right?

11 A. Yes.

12 Q. And you met with the chief about what to do after the  
13 fitness-for-duty was -- after Dr. Nelson found that Lieutenant  
14 Broach was fit for duty?

15 A. Yes, ma'am.

16 Q. And you also talked to Chief Braun about transferring Mark  
17 Broach out of Engine 34; right?

18 A. Yes.

19 Q. And --

20 MS. POWELL: Objection.

21 THE COURT: Sidebar.

22 SIDEBAR CONFERENCE

23 MS. POWELL: The objection -- or the question brings  
24 up the issue of transfer, which was ruled on by this Court as  
25 an issue not to be raised as an adverse action suggesting that

1 -- no reason to bring it -- to be talking about transferring  
2 when you ruled that it was a legitimate business decision.

3 MS. BRANCH: I need to get the basis for where that  
4 information came from about Captain Campbell and Mark Broach  
5 not getting along.

6 MS. POWELL: What information?

7 MS. BRANCH: That's in the transfer memo.

8 MS. POWELL: The transfer memo shouldn't be part of  
9 this either. The --

10 MS. BRANCH: It talks about the history of the  
11 conflicts that they had in 2010, trying to find the course of  
12 that.

13 MR. GIGLIO: Did Chief Winston sign that?

14 MS. BRANCH: Did he sign it? No, but he talked about  
15 it in his deposition.

16 MS. POWELL: Since then the Court has ruled on the  
17 issue of transfer and it's not part of this case --

18 MR. GERHARDSTEIN: The Court didn't exclude it from  
19 the case. It just said we can't have it on the verdict form  
20 as one of our adverse actions. It's part of the story. It's  
21 part of --

22 THE COURT: We talked about it; right?

23 MS. BRANCH: Right. And Burkert wrote it, and he  
24 said that he -- he was not clear as to what the source of the  
25 information came from, how he learned about the conflicts from

1 2010.

2 THE COURT: Ask him that, and then you can use the --  
3 depending on his answer, you can use the exhibit.

4 MS. BRANCH: All right. Okay.

5 CONCLUSION OF SIDEBAR CONFERENCE

6 Q. I'm going to show you Plaintiff's Exhibit 17. You're  
7 welcome to look at it in your book.

8 This is a memo you received about an administrative  
9 transfer of Lieutenant Broach?

10 A. You say I received it? Is that what you said?

11 Q. Well, it's got -- I'm assuming you received it. It's got  
12 your name on it?

13 A. I actually typed it, so --

14 Q. You did type it?

15 A. I did type it, yes.

16 Q. Okay. And this is a -- this is the paragraph I talked  
17 about with Chief Burkert yesterday in his testimony?

18 A. Yes.

19 Q. You've been sitting through the whole trial; right?

20 A. Yes.

21 Q. So you've heard it all; right?

22 A. Yes.

23 Q. This paragraph about "It's my opinion" -- I'm sorry. I  
24 guess it was Chief Potter that talked about it. He says in  
25 his opinion, "Broach and Campbell should not be assigned in

1 the same firehouse due to past strained relations. The  
2 conflict came to light in 2010."

3 You said you're one that typed this memo?

4 A. Yes.

5 Q. And what's the source of the information? Is that Captain  
6 Campbell? Did you talk to him about the conflict and the  
7 strained relations with Lieutenant Broach?

8 A. No. I think in -- in that Dr. Nelson's report, he talked  
9 a little bit about some of the issues that Lieutenant Broach  
10 and Captain Campbell had.

11 Q. So you used the information that you received from the  
12 psychological report to administratively transfer Lieutenant  
13 Broach?

14 MS. POWELL: Objection.

15 THE COURT: I'm going to overrule unless you want a  
16 sidebar to discuss it.

17 A. He wasn't administratively transferred.

18 Q. You -- well, he was recommended to be administratively  
19 transferred; would you agree with that?

20 A. I would have told him that was going to be one of his  
21 options, but no, he was never administratively transferred.

22 Q. Would you agree that the Fire Administration was  
23 recommending that he be administratively transferred?

24 A. Yes.

25 Q. Okay. So you used the information you got from the

1 psychological report to draft this recommendation for  
2 administrative transfer.

3 A. No. I drafted the -- I mean, we do administrative  
4 transfers all the time. I don't need a report to tell me how  
5 to do it. But I'm just talking about the reasons they weren't  
6 going to work together was based upon those strained relations  
7 that appeared.

8 Q. Did you talk to Captain Campbell?

9 A. No.

10 Q. Did you talk to Lieutenant Broach?

11 A. No.

12 Q. So this was your idea?

13 A. The chief and I discussed it, yes.

14 Q. And whose decision was it to issue this recommendation?

15 A. I mean, ultimately the chief can overrule me, so it's  
16 actually his. But, as I mentioned before, I'm the one that  
17 actually authored the report.

18 Q. So the chief approved your recommendation?

19 A. Yes.

20 Q. Did you have any personal knowledge from your own eyes and  
21 ears what happened in 2010 between Lieutenant Broach and  
22 Captain Campbell?

23 A. No, not just -- except what I heard around the department,  
24 but no personal knowledge, no.

25 Q. Did you know back in 2010 that there was a conflict

1 between Lieutenant Broach and Captain Campbell?

2 A. No. I didn't have personal knowledge, no.

3 Q. Did you -- in 2010, remind me, what level position were  
4 you?

5 A. In 2010 I would have been a district chief assigned to  
6 Dispatch, Fire Communications.

7 Q. And did you know that there was racial animosity between  
8 Ron Evans and Captain Campbell back in 2010?

9 A. No, ma'am.

10 Q. Did you hear that around the Fire Department?

11 A. Yes.

12 Q. And you heard that there was racial animosity between Ron  
13 Evans and Captain Campbell back in the year 2010?

14 MS. POWELL: Objection.

15 THE COURT: Let's have a sidebar, please.

16 SIDEBAR CONFERENCE

17 MS. POWELL: She is asking him to testify to hearsay.  
18 I'm objecting on that basis.

19 MS. BRANCH: I didn't ask him to tell me who he heard  
20 it from or what they said. I'm only asking if he had  
21 knowledge.

22 MS. POWELL: And I asked similar questions of  
23 witnesses earlier today and was not allowed to ask that on the  
24 basis of hearsay.

25 MS. BRANCH: You were -- I don't know what you were

1 asking. Those questions were not this question.

2 THE COURT: He can answer yes or no, but if he starts  
3 to --

4 MS. BRANCH: Sure. I wasn't going to go any further.  
5 I know the limits.

6 MR. GIGLIO: We would note our objection. It still  
7 calls for hearsay responses, and it's hearsay if he heard  
8 rumors. It would be admissible, just for --

9 THE COURT: Okay. Thank you.

10 CONCLUSION OF SIDEBAR CONFERENCE

11 MS. BRANCH: Could you read the question back?

12 (The record was read by the reporter.)

13 A. Well, I heard there was just problems. They had issues at  
14 the 34s, is what I heard.

15 Q. Okay. And did you believe those to be racially -- that  
16 race was involved somehow?

17 A. No, I didn't, no.

18 MS. BRANCH: Does the witness have his deposition at  
19 the stand?

20 THE COURT: Can we get that, please?

21 (The courtroom deputy assisted the witness.)

22 Q. Is that your deposition transcript from the deposition I  
23 took of you January 28, 2013, at City Hall?

24 A. Yes, ma'am.

25 Q. And you were under oath at the time?

1 A. Yes.

2 Q. Did you get an opportunity to read your transcript after  
3 it was typed up?

4 A. I'm sure I did.

5 Q. Did you make any changes to it?

6 A. No.

7 Q. If you could turn to page 18, line 17? Just let me know  
8 when you're there.

9 A. You said page 18, line 17?

10 Q. That's right.

11 A. Yes, I got it.

12 Q. Okay.

13 "Question: Did you know there was racial animosity, at  
14 least from the perspective of Ron Evans?

15 "Answer: I heard that, yes, but --

16 "Question: Before you got involved in the depositions in  
17 this case, did you know that?

18 "Answer: I'd have to say I probably heard it around the  
19 Fire Department, but that was, that was the extent of it."

20 Did I read that correctly?

21 A. Yes, you did.

22 Q. Okay. So does that clarify that what you were hearing  
23 about the problems with Ron Evans involved race?

24 A. Yeah. That refreshes my memory, yes.

25 Q. Okay. Great. Well, let me move on to the releases that

1 you were involved with.

2 If I understand the testimony that we've heard so far,  
3 Chief Burkert around August, around the time you became  
4 assistant chief, you both realized that Lieutenant Broach had  
5 been out for a while, and you wanted to get him back to work.  
6 Is that your testimony?

7 A. Yes.

8 Q. And to getting him back to work, he needed to sign a piece  
9 of paper so that Dr. Nelson's report would come to the City;  
10 right?

11 A. Yes.

12 Q. And we heard from Chief Burkert from his -- one of his  
13 e-mails that the report, the release for Lieutenant Broach and  
14 the appointment with Dr. Nelson should be done as close to the  
15 one-year anniversary in October. Do you remember that?

16 A. Yes.

17 Q. So even though you two came to this decision in August,  
18 the plan was -- the Broach plan was to bring him back to work  
19 -- I'm sorry, bring him to Dr. Nelson as close to the October  
20 one-year anniversary as possible; right?

21 A. I wouldn't call it the plan, no.

22 Q. Wasn't that the title of the e-mail?

23 A. I don't recall a title of it.

24 Q. And the release -- you learned about the dispute over the  
25 releases; right?

1 A. Yes, ma'am.

2 Q. And in your termination letter to Lieutenant Broach, you  
3 said the releases go to you and EHS, Risk Management; right?

4 A. Yes.

5 Q. But the release that Chief Burkert drafted, it was to you,  
6 to him, to Captain Ransick and to Internal; right?

7 A. One, I don't know who drafted it, but yes, that ended up  
8 being that way, yes.

9 Q. Well, I thought you testified just now in your direct that  
10 it was Chief Burkert who was in charge of getting those  
11 releases.

12 A. Chief Burkert in conjunction with Employee Health, yes.

13 Q. Okay. And I also -- I actually thought I heard you say  
14 that he was the one that had the forms prepared; is that  
15 right?

16 A. I know he worked with EHS, but no, I'm not positive that  
17 he actually prepared it.

18 Q. Nonetheless, you learned there was a disconnect between  
19 the letter you sent and the release that Mark Broach was told  
20 to sign; right?

21 A. Yes, ma'am.

22 Q. And the release that Lieutenant Lemons took to him to sign  
23 had all the extra names on it; right?

24 A. Yes.

25 Q. Even though you knew that Lieutenant Broach had a concern

1 with his privacy rights; right?

2 A. I found out about that letter being -- going with him  
3 after the fact, yes.

4 Q. Have you ever asked Chief Burkert why he added Ransick,  
5 himself and the union?

6 A. No, I never asked.

7 Q. Even today, you don't know why he did that?

8 A. No.

9 Q. Did you ever ask him why he told Lieutenant Lemons it was  
10 okay to cross off those names but don't encourage Mark Broach  
11 to do it?

12 A. No, ma'am.

13 Q. Now, you also know that one of the issues in this case is  
14 a delay in getting the Internal investigation result to Mark  
15 Broach; right?

16 A. Yes.

17 Q. You've heard the testimony they were signed June 16th, he  
18 didn't find out about them, didn't get a copy until that first  
19 meeting with Lieutenant Lemons, Lisa Berning in September;  
20 right?

21 A. Yes, ma'am.

22 Q. And, in fact, we've got two versions in the exhibit book,  
23 the June 16th version and the version Lieutenant Lemons gave  
24 him September 24th; right?

25 A. Yes, ma'am.

1 Q. And you would agree, now in your position in HR, which  
2 includes Internal, that Internal Investigations should do the  
3 best they can to notify the employee when the charges are  
4 resolved; right?

5 A. That may be my philosophy, yes, but I think our policy has  
6 changed as to how we deal with people who are off on stress  
7 leave as opposed to how it was some years ago.

8 Q. And when you say policy, do you mean practice?

9 A. Practice, yes.

10 Q. There's nothing in writing about any of this, is there?

11 A. No.

12 Q. There's no written rule, "Don't contact somebody on stress  
13 leave"; right?

14 A. At that time, that was the fire chief's direction, so yes,  
15 that was just his directive. There was nothing in writing.

16 Q. But you recognize that's unfair, right, so you've changed  
17 the practice?

18 A. I wouldn't say I thought it was unfair. I just -- that's  
19 not the way I would do business, no. So I believe that  
20 usually we can notify people, yes.

21 Q. And you actually think that Internal should do due  
22 diligence in order to find the person; right?

23 A. Absolutely.

24 Q. One place to look is the personnel file to see what their  
25 home address is; right?

1 A. That's where we start.

2 Q. That's where you start. And you know that not every  
3 employee updates their personnel file in a timely manner;  
4 right?

5 A. I wish it wasn't the case, but yes, you're right.

6 Q. And so that gives Internal investigators a little extra  
7 work to do; right?

8 A. Yes.

9 Q. If the home address is no good, you look for a phone  
10 number; right?

11 A. Yes.

12 Q. Or a private e-mail address; right?

13 A. We'd look for any contact information we can.

14 Q. Like we found an e-mail there from Rick Reed that had his  
15 AOL address on it, for example.

16 A. Yes.

17 Q. And with Mark Broach, it was pretty easy to find his cell  
18 phone number, right, because you said Chief Demasi gave it to  
19 you.

20 A. Yeah. But, I mean, 2011, I guess he ran into him in the  
21 park and, yes, he gave us his number.

22 Q. Okay. So one way is to ask people, "Do you have a number  
23 for Mark Broach?"

24 A. Yes.

25 Q. Another is just to look at the City forms. And we have

1 his EEO form; right? I'm not going to post it for the jury to  
2 read, but if you could turn to Plaintiff's Exhibit 4, that's  
3 in the plaintiff's book. Oh, yours is redacted.

4 MS. BRANCH: May I approach?

5 THE COURT: You may.

6 Q. I'm going to give you an unredacted copy of Plaintiff's 4,  
7 which has the phone numbers that -- you can read them.

8 Would you agree that Mark Broach's EEO form that he filled  
9 out with the City March 18th, that had his work phone? That's  
10 the firehouse; right?

11 A. Yes.

12 Q. And he had his cell phone underneath it. That's this  
13 second blacked-out line?

14 A. Okay.

15 Q. It's a phone number; right?

16 A. Yes, it's a number, yes.

17 Q. And do you know that to be his cell phone number?

18 A. I don't.

19 Q. But Internal could have found that, right, if they were  
20 looking for him in March or June of 2010? This EEO form is  
21 public record; right?

22 A. Yes.

23 Q. So they could have easily called up EEO, asked them if  
24 they got a phone number for him and see if it worked; right?

25 A. You're talking about 2010 or are you talking about today?

1 Are you going back to 2010?

2 Q. Oh, I'm talking about if somebody -- if Internal was  
3 trying to look for him in back in 2010, they could --

4 A. I don't think they were looking for him. I think they --

5 Q. No, I don't think they were either.

6 A. He was on stress at that point.

7 Q. Right. I don't think they were looking for him. My  
8 question is, could they have found him if they tried?

9 A. Yes.

10 Q. Okay. So the due diligence wouldn't really take much  
11 work.

12 A. No. Correct.

13 Q. Now, you've changed the practice because you recognized  
14 that some people, like Mark Broach, go out on stress leave  
15 when they've got those charges pending; right?

16 A. I've changed the practice because I think -- normally,  
17 what's customary is people are falling all over themselves to  
18 get back to work. So normally that's not even an issue. I  
19 mean, they're looking for us to come back.

20 But, at the same time, when things are accomplished or  
21 when changes are made in their situation, I feel it's  
22 important that they get notified of that. But, granted,  
23 that's just my particular policy -- or practice that we  
24 utilize.

25 Q. Is Mark Broach the only person that you know that was on

1 stress leave waiting for charges to be pending?

2 A. During my time frame?

3 Q. During your career.

4 A. I don't know about my whole career, but I -- just during  
5 my time frame, there has been other people to go out -- I've  
6 had -- within my two years, I've had people to go out on  
7 stress leave, yes.

8 Q. Are you aware that Mark Broach's purpose for going on  
9 stress leave was he was removed from the front seat in  
10 addition to having the charges pending against him?

11 A. I learned that from here, yes.

12 Q. Okay. And you also learned that Mark Broach was suffering  
13 stress during that time that he was waiting to hear the  
14 results of the charges; are you aware of that?

15 A. Just from here, yes.

16 Q. Do you have any reason to disagree with that?

17 A. I really -- I didn't -- I had no idea at the time what he  
18 was off for.

19 Q. Right. But now that you've heard about it, do you have  
20 any reason to disagree that --

21 A. I'm sure that can be a stressful situation.

22 Q. Okay. It's obvious that it would be stressful if somebody  
23 felt that they were unfairly charged, they're charged, they're  
24 removed from the front seat, and now they are waiting around  
25 to find out the results. During that period of time, it would

1 be stressful to that firefighter.

2 A. Definitely not an easy situation, sure.

3 Q. Okay. And during that time you know that Lieutenant  
4 Broach was on some sort of leave, in order for him to be paid  
5 he had to use comp time, vacation time, holiday pay, those  
6 things in order to still get a paycheck while he was on leave;  
7 right?

8 A. Yes.

9 Q. And he depleted all of those hundreds of hours of leave  
10 time that he had accumulated over his career; are you aware of  
11 that?

12 A. Yes.

13 Q. And I think we've had an agreement with the City that he  
14 had almost completely depleted it by September, but when he  
15 was sent for the fitness-for-duty it was all depleted by the  
16 end of October, October 30th, 2010; is that right?

17 A. Yes, ma'am.

18 Q. So during the time that he is out on that stress leave,  
19 which was about six and a half months, March 5th to September  
20 22nd, he used up all of his accrued benefits and he was not  
21 eligible for earning overtime or comp time; is that right?

22 A. If there was overtime during that period. I would have to  
23 look at the records to show -- back in 2010 we were browning  
24 out like we are at now. But during Chief Wright's tenure,  
25 there was a long period where there wasn't any overtime. I

1 would have to check the records to see.

2 Q. Okay. So if overtime was allowed by anybody, he would  
3 have lost that as a benefit during that six and a half months?

4 A. Yes.

5 Q. Now, I think we're going to have an agreement by the  
6 parties about back pay and lost wages, so I will not ask you  
7 those questions, except let me just ask you one.

8 You've done some calculations of Mark Broach's income  
9 during 2010, 2011 and 2012; is that right?

10 A. Yes.

11 Q. And when you add it all up and average it out for a  
12 monthly number, that comes up to about \$6,175 a month; is that  
13 right?

14 A. I can't be positive, but it sounds what I added up.

15 Q. Within a few dollars?

16 A. Yes.

17 Q. Okay. Now, when the report from Dr. Nelson came out, it  
18 was sent to Employee Health Services and then sent to you; is  
19 that right?

20 A. Yes. I don't know if it was sent to Risk Management as  
21 well.

22 Q. Oh, I'm sorry. I think you're right. I think it was Risk  
23 Management and then to you.

24 A. Yes, ma'am.

25 Q. And, if you want, it's Joint Exhibit 20. I'll just use

1 the top page here. It's got -- I don't understand your time  
2 stamps, but "Finance Received, November 21st, Risk Management  
3 Department," does that mean Risk Management got it?

4 A. I would assume so, yes.

5 Q. And you got it from them, and you read the conclusion that  
6 he was fit for duty?

7 A. Yes, I would have, yes.

8 Q. Did you get that sometime around November 21st?

9 A. No. I think it was probably more towards the end of  
10 November.

11 Q. And did you know that Mark Broach was asking for a copy of  
12 the report?

13 A. I did not.

14 Q. He couldn't get one from Dr. Nelson; right?

15 A. I didn't know.

16 Q. Did you know I was asking for a copy of the report?

17 A. I knew that through my attorney, yes.

18 Q. Okay. And did you fax me a copy of this report?

19 A. I think I did, yes.

20 Q. Just checking any dates. January 6, 2012 sound about  
21 right when you faxed me a copy of Dr. Nelson's report?

22 A. It sounds okay. So many days, but it sounds good.

23 Q. And you wouldn't give it to me without a release; right?

24 A. You're right.

25 Q. Right. So Mark Broach had to sign a release allowing you

1 to give it to me?

2 A. Yes.

3 Q. Now, he didn't come back to work at the end of November  
4 when you found out he was fit for duty; right?

5 A. No.

6 Q. And he didn't come back to work after he filed the lawsuit  
7 in January; right?

8 A. I think he came back a little bit after that.

9 Q. He came back on a Sunday because that's the start of your  
10 pay periods?

11 A. Yeah. He came back on the payroll on the Sunday. I don't  
12 know if that was his first day or not.

13 Q. And that was February 12, 2012?

14 A. Yes, ma'am.

15 Q. So for those three months while you were deciding about  
16 counseling, talking to Chief Braun, going on your holiday  
17 vacation at the end of the year, Mark Broach was without pay;  
18 right?

19 A. Yes.

20 Q. Chief Winston, have you ever felt discriminated against  
21 based on your race?

22 A. No.

23 Q. And --

24 A. What do you mean, in my whole life?

25 Q. Yeah. I had already asked you at the City, and I think

1    you already said no.

2    A.   Okay.

3    Q.   But I'm asking --

4    A.   I'm sure probably in my lifetime, yes.

5    Q.   And were any of those incidents where you felt  
6    discriminated against make you feel uncomfortable or upset?

7    A.   Yes.

8    Q.   And were any of those instances public, in other words,  
9    done to you a public way?

10   A.   Yes.

11   Q.   Where other people witnessed the fact that you were being  
12   discriminated against?

13   A.   It was in public, but I don't necessarily know if other  
14   people -- I don't really know what the setting as far as what  
15   they acknowledged or what they witnessed.

16   Q.   And how did you feel about that?

17   A.   I mean, I didn't like it.

18   Q.   Were you upset?

19   A.   Yeah, I'm sure I was, yes.

20   Q.   And were you embarrassed?

21   A.   I don't know about embarrassed.  I mean, I was upset  
22   though.

23   Q.   And did you do anything about it?

24   A.   No.  I mean, I'm sure I probably had something to say  
25   back, yes.

1 Q. And how about any of your -- I'm not going to ask names,  
2 but any of your close family or friends been discriminated  
3 against based on their race that you know of?

4 A. I mean, I have a lot of older relatives, you know, that  
5 grew up in the South, places like that, yes. So I've heard  
6 stories that they've told.

7 Q. And were some of those at work?

8 A. Yes.

9 Q. Losing jobs or losing pay or losing promotions?

10 A. I don't necessarily recall all the circumstances.

11 Q. And when they tell you those stories, do they relate to  
12 you their feelings about that?

13 A. Yes.

14 Q. And they feel upset about it?

15 A. Yes.

16 Q. Angry?

17 A. That might happen, yes.

18 Q. Embarrassed?

19 A. I don't know about embarrassed, but once again, they were  
20 upset or angry, yes.

21 Q. And did they do anything about those instances of  
22 discrimination?

23 A. I think in those times it was oftentimes more difficult,  
24 they found it more difficult to do anything about it. I think  
25 in many cases they suffered through them.

1 Q. So you understand how Mark Broach is feeling; right?

2 MS. POWELL: Objection.

3 THE COURT: Overruled. You can answer.

4 A. I can't necessarily say I'm walking, I mean, in his shoes,  
5 so no, I can't -- I don't understand how he is feeling, but  
6 anybody that actually has been discriminated against, yeah, I  
7 know that can be -- and if it was genuine discrimination,  
8 yeah, I'm sure it's not a pleasant thing at all.

9 Q. And if they felt that it was discrimination even if they  
10 couldn't prove it, they'd still feel just as bad; right?

11 A. I'm sure it would be difficult.

12 Q. And if they thought they could prove it and their employer  
13 didn't agree with them, it would feel even worse.

14 A. I'm sure they wouldn't feel good, yes.

15 MS. BRANCH: May I have a moment?

16 THE COURT: Yes.

17 (Pause in proceedings.)

18 MS. BRANCH: No further questions for Chief Winston.  
19 Thank you.

20 THE COURT: Thank you.

21 Miss Powell.

22 REDIRECT EXAMINATION

23 BY MS. POWELL:

24 Q. Plaintiff's Exhibit 17, is this your administrative  
25 transfer memo?

1 A. Yes, ma'am.

2 Q. Okay. And you testified earlier that the chief okayed  
3 your -- signed off on this memo; correct?

4 A. Yes.

5 Q. Even though he signed off on it, was the administrative  
6 transfer processed?

7 A. No.

8 Q. And was there any question that you -- that the Fire  
9 Department wasn't going to bring Lieutenant Broach back?

10 A. No. After we got the evaluation, our intent or our plan  
11 was to bring him back.

12 Q. Okay. You were asked about the efforts that the HR  
13 Division could take to find out how to reach its employees;  
14 right?

15 A. Yes.

16 Q. What are the obligations of firefighters to keep their  
17 personal information current?

18 A. It's part of our policies and procedures to do that, to  
19 maintain accurate information.

20 Q. And do you expect your division to have to call around to  
21 different departments in the City to find out employees'  
22 whereabouts?

23 A. No. I mean, we appreciate if we had -- like I said, it is  
24 part of our procedures and policies to have accurate contact  
25 information.

1 Q. Do you ever feel like you have to send a public records  
2 request to the City to find out where one of your employees  
3 is?

4 A. At times.

5 Q. Do you think you should have to?

6 A. No.

7 Q. How about hiring a private investigator, you could do that  
8 as well; right?

9 A. Could.

10 Q. I'm sorry, I couldn't hear you.

11 A. I could, but we would not do that.

12 Q. Okay. You heard Ron Clemons, the PEAP counselor, testify  
13 his opinion that Lieutenant Broach could have come back to  
14 work from stress leave as early as April of 2010; right?

15 A. Yes.

16 Q. If Lieutenant Broach had come back that early, would he  
17 have used up all of his sick time?

18 A. No.

19 Q. His vacation time?

20 A. No.

21 Q. And during the time that Lieutenant Broach was out on  
22 stress leave, was he receiving a paycheck?

23 A. During 2010? Yes, he was.

24 Q. Okay. And was -- even though he was out on sick leave,  
25 was he accruing his vacation and other sick leave and other

1 days?

2 A. Yeah. When you're out on sick leave, you would accrue all  
3 the same benefits as if you were working regularly. The only  
4 thing that's different is you're burning the time, burning  
5 that sick time out of your bank, but all your benefits and  
6 fringe benefits are the same.

7 Q. We've seen the EHS report that was completed is dated  
8 November the 21st, 2011; right?

9 I'm sorry, let me -- strike that.

10 The completed psyche evaluation for Lieutenant Broach is  
11 dated November the 21st, 2011; correct?

12 A. Yes, ma'am.

13 Q. And does that go directly to Fire or does it go to any  
14 other departments before it reaches you?

15 A. I think it went to Financial, Risk Management before it  
16 ever came to us.

17 Q. Did Lieutenant Broach ever call you to ask you about the  
18 status of his ability to come back to work?

19 A. Not that I'm aware, no.

20 Q. Did he ever call you to ask you for a copy of the  
21 psychological evaluation report?

22 A. No.

23 Q. If he had called you, what would you have told him?

24 A. As far as the?

25 Q. If he had called you to ask you about the status of his

1 ability to get back to work, what would you have told him?

2 A. I would have just discussed with him like I did when he  
3 came in January, just, you know, how we were going about doing  
4 it. We would, no doubt, had a discussion at least to let him  
5 know or inform him what we were doing in anticipation of him  
6 coming back to work.

7 Q. Can you remind me, how many years have you been with the  
8 City?

9 A. Twenty-five.

10 Q. And all 25 of those at the Fire Department?

11 A. Yes, ma'am.

12 Q. Have you ever equated the City or the City Fire Department  
13 to the injustices of 1960s South?

14 A. I never have, no.

15 MS. POWELL: No questions.

16 THE COURT: Thank you.

17 Miss Branch, do you have any additional questions?

18 MS. BRANCH: No, Your Honor.

19 THE COURT: All right.

20 At this time, the jury may ask questions of this witness.

21 Miss Lahley will collect them when you're done.

22 SIDEBAR CONFERENCE

23 THE COURT: Okay. "Have you been aware of any  
24 complaints from African Americans at Engine 34 about Mark  
25 Broach or Ron Evans since March 2010?"

1 MR. GERHARDSTEIN: Since?

2 THE COURT: Yes.

3 MS. POWELL: Can you read that again?

4 THE COURT: "Have you been aware of any complaints  
5 from African American firefighters at Engine 34" -- I think it  
6 should read -- "about Mark Broach or Ron Evans since March  
7 2010?"

8 MS. POWELL: We have had every variation of this  
9 question. I don't have any objections.

10 MS. BRANCH: Neither of them have been there since  
11 then, so whatever complaints they'd heard wouldn't be based on  
12 --

13 THE COURT: That time.

14 MS. BRANCH: Yeah. I think Ron left, and Mark never  
15 went back to 34.

16 MR. GERHARDSTEIN: Good point.

17 MS. BRANCH: So I don't think it would be relevant to  
18 our timeframe.

19 THE COURT: Yeah, I agree. Okay. I'm not going to  
20 ask that question.

21 Number two. "Why was it so important to the Fire  
22 Department not to contact anyone on stress leave? Please give  
23 concrete reasons."

24 MS. BRANCH: No objection.

25 MS. POWELL: No objection.

1 MS. BRANCH: Are you going to read it just like that?

2 THE COURT: Yeah.

3 MS. BRANCH: With emphasis.

4 THE COURT: "How many firefighters were off track six  
5 or more months at the time Winston and Burkert reviewed that  
6 situation in 2011?"

7 MR. GIGLIO: Fine, if he knows.

8 MS. POWELL: No objection.

9 THE COURT: "Can you provide examples of what kind of  
10 problems people have had with Risk Management seeing the full  
11 results from fitness-for-duty evaluations?"

12 MR. GIGLIO: I think that might be a problem because  
13 it goes to their medical conditions. Is that what they're  
14 asking?

15 MS. POWELL: And I could see asking are you aware of  
16 whether --

17 MS. BRANCH: I think he already did.

18 THE COURT: Yeah, he did testify.

19 MS. BRANCH: That's why he was okay with taking  
20 Texter's name off. I don't think you could say without  
21 violating anybody's privacy. No objection.

22 MS. POWELL: No objection.

23 THE COURT: "Do you feel the disparity in discipline  
24 between black and white firefighters is due to racism?"

25 MS. POWELL: No objection.

1 MS. BRANCH: No objection.

2 THE COURT: This is the number four. It's the last  
3 one. But there are several.

4 "What area of Human Resources for the Fire Department  
5 monitors time off?"

6 MS. BRANCH: No objection.

7 MR. GIGLIO: Fine.

8 THE COURT: "Is six months a long time for any City  
9 employee to be off?"

10 MS. BRANCH: No objection.

11 MR. GIGLIO: Any City employee or just Fire?

12 THE COURT: It says "City."

13 MR. GIGLIO: If he would have the knowledge to answer  
14 that.

15 THE COURT: Okay. We'll see what he says.

16 "Does the City have a third-party department that handles  
17 time off matters? Examples, short-term disability, doctor  
18 requirement, outside agency, fitness for duty."

19 MS. BRANCH: No objection.

20 MR. GIGLIO: No objection.

21 THE COURT: Do you want me to read the examples as  
22 well? "Short-term disability, doctor requirement"?

23 MS. BRANCH: That's okay.

24 THE COURT: Okay.

25 "How often do the supervisors get together and attend

1 diversity classes together?"

2 MS. BRANCH: No objection.

3 MS. POWELL: No objection.

4 THE COURT: "Does the City offer classes on how to  
5 coach and discipline employees equally across the board?"

6 MS. BRANCH: No objection.

7 MR. GIGLIO: No objection.

8 THE COURT: All right. As far as timing, is he your  
9 last witness?

10 MS. POWELL: We are not going to call anyone else.  
11 It's our last.

12 THE COURT: So we'll deal with the exhibits outside  
13 the presence of the jury if --

14 MS. BRANCH: No rebuttal.

15 THE COURT: Okay. So we'll -- do you want to rest  
16 today?

17 MR. GIGLIO: We'd like to move our exhibits in.

18 THE COURT: You could rest on the record today in  
19 front of them.

20 MR. GERHARDSTEIN: Yeah. We aren't going to play  
21 gotcha. It's subject to --

22 MR. GIGLIO: Subject to us -- that would be fine. I  
23 just want to make sure -- I'd like to do it in the presence of  
24 the jury.

25 THE COURT: Do you want to do it today?

1 MR. GIGLIO: We can do it today.

2 THE COURT: And then we'll do the charge conference  
3 tonight. Do you want to start what time tomorrow?

4 MR. GERHARDSTEIN: Nine.

5 MS. POWELL: Do we want to move our exhibits in  
6 tonight or tomorrow?

7 MR. GIGLIO: Can we do that in the morning?

8 THE COURT: Yes, we can do that in the morning.  
9 We'll have to come early.

10 MS. POWELL: Okay.

11 MR. GERHARDSTEIN: You have to get the book ready for  
12 going back then.

13 THE COURT: Unless we can -- I don't mind doing it  
14 today before the charge conference either.

15 MS. BRANCH: It's three-quarters ready. I think I  
16 have my list.

17 MR. GIGLIO: Pretty much. I just want to make sure  
18 --

19 THE COURT: We'll discuss it afterwards.

20 MS. POWELL: Okay.

21 MR. GIGLIO: Thank you, Judge.

22 CONCLUSION OF SIDEBAR CONFERENCE

23 THE COURT: I have some questions to read for you.

24 Why was it so important for the Fire Department not to  
25 contact anyone on stress leave? Please give concrete reasons.

1           THE WITNESS: I think a lot of it had to do with the  
2 type of the reason for the stress. If the Department felt  
3 that they were the cause of the stress, they didn't want to  
4 put anymore undue stress on the individual, you know, further,  
5 I guess make that anymore difficult. So that was their -- the  
6 chief at that time, that was his rationale as to why. That  
7 was kind of his policy, and he advised the HR to carry that  
8 out.

9           THE COURT: How many firefighters were off track six  
10 or more months at the time you and Burkert reviewed that  
11 situation in 2011?

12          THE WITNESS: I think we sent options letters to 18  
13 individuals.

14          THE COURT: Without violating anyone's privacy, can  
15 you provide examples of what kind of problems people have had  
16 with Risk Management seeing the full results from  
17 fitness-for-duty evaluations?

18          THE WITNESS: I think more -- I don't know what the  
19 actual problems. I think it's more just anybody that's coming  
20 into your -- what they view more as their personal life. In  
21 this case, it's your mental health or your physical  
22 well-being. Because I think a lot of times people feel that  
23 if something isn't right, they will move to separate them  
24 either medically or mentally to some degree.

25          So I think just that perception that exists that there is

1 a chance that something is wrong with me, HR will move to  
2 separate me. I think that's really what people -- I don't  
3 think it's any specific thing. I think it's just they know  
4 that down the road if we were looking to terminate you if  
5 there was something found.

6 THE COURT: Do you feel disparity and discipline  
7 between black and white firefighters is due to racism?

8 THE WITNESS: I don't think it's necessarily due to  
9 racism. I think a lot of it is -- you know, the Fire  
10 Department is diverse. People come from a lot of different  
11 backgrounds. They are raised a different way. I don't think  
12 -- sometimes the way people treat certain individuals, I don't  
13 think they necessarily see it that way. I don't think it's  
14 racist motives. Is it unfair? Absolutely, it can be. I  
15 don't necessarily think that we have a tremendous racial  
16 problem, but I think we have -- we have some work to do when  
17 it comes to -- in essence, since we live with one another, so  
18 the way that we treat one another, we have some work to do in  
19 that area.

20 THE COURT: What area of Human Resources for the Fire  
21 Department monitors time off?

22 THE WITNESS: At a lower level, it's really  
23 Operations. Operations Bureau actually monitors the time off  
24 for those people in their Bureau. More than 700 firefighters,  
25 probably, belong to what's called the Operations Bureau. It's

1 really their job to monitor time.

2 HR usually gets it when it becomes an issue, when there is  
3 excessive absenteeism or excessive sick with pay. That's  
4 usually when it's turned over to the Human Resources Bureau,  
5 and then we have to do deal with it.

6 THE COURT: Is six months a long time for any City  
7 employee to be off?

8 THE WITNESS: Yes.

9 THE COURT: Does the City have a third-party  
10 department that handles time off matters? For example,  
11 short-term disability, doctor requirements, outside agencies  
12 or fitness-for-duty.

13 THE WITNESS: We have -- the Risk Management handles  
14 the majority of those, but our contract allows people, at  
15 times when there is a third-party dispute, that they can  
16 actually have an outside doctor weigh in. That doctor will  
17 end the dispute either on the City side or on the member side.

18 THE COURT: How often do the supervisors get together  
19 and attend diversity classes together?

20 THE WITNESS: I don't think there is any regular  
21 scheduled diversity. I think through the years they've had  
22 classes, but nothing that has been of a regular or consistent  
23 schedule.

24 THE COURT: Does the City offer classes on how to  
25 coach and discipline employees equally across the board?

1           THE WITNESS: The City HR does offer some classes  
2 that would apply to that. The problem with the Fire  
3 Department attending a lot of those is, we are -- we backfill  
4 our members. So anybody that would go to training, we would,  
5 in essence, have to pay overtime for that. And so if I was --  
6 the administrative staff, yeah, we can attend those types of  
7 sessions, but it's much more difficult for our frontline  
8 individuals to go. So I would say that is definitely lacking  
9 on their part.

10           THE COURT: Thank you. Those are all the questions I  
11 have.

12           Based upon those questions, Miss Powell, do you have any  
13 follow-up?

14           MS. POWELL: No, Your Honor.

15           THE COURT: Miss Branch?

16           MS. BRANCH: One second.

17           THE COURT: Okay.

18           (Pause in proceedings.)

19           MS. BRANCH: No questions, Your Honor.

20           THE COURT: All right. Thank you.

21           Thank you, Mr. Winston.

22           (The witness was excused.)

23           THE COURT: Does the City have any additional  
24 witnesses they would like to call?

25           MR. GIGLIO: No, Your Honor.

1           THE COURT: Thank you. All right. Is there anything  
2 else you would like to put on the record at this time?

3           MR. GIGLIO: Your Honor, the only thing we would put  
4 on the record, the City would rest subject to our ability to  
5 move certain exhibits into evidence.

6           THE COURT: All right. Thank you.  
7 Miss Branch, do you have any rebuttal witnesses?

8           MS. BRANCH: No, we don't, Your Honor.

9           THE COURT: All right. Thank you.

10          All right. Ladies and gentlemen, at this time we have  
11 reached the conclusion of the evidence. The attorneys and I  
12 need to spend some time going over the jury instructions, and  
13 we will do that this evening.

14          Tomorrow we would like to start at nine a.m. The plan  
15 will be I will read most of the jury instructions to you at  
16 that time. We'll have closing arguments, and then I will read  
17 the remainder of the jury instructions after the conclusion of  
18 the closing arguments. Then you'll be able to deliberate after  
19 that.

20          Anyone have any questions or problems with that plan to  
21 start at nine? Is that all right?

22          MEMBERS OF THE JURY: Yes.

23          THE COURT: Okay. All right. Let me give you the  
24 recess instruction, which may be my last time.

25          During this recess you must not discuss this case with

1 anyone including your fellow jurors, members of your family,  
2 anyone involved in the case or anyone else. If anyone tries  
3 to talk to you about the case, let us know immediately. Do  
4 not read, watch or listen to any news reports on the case. Do  
5 not get on the Internet to research the case or discuss the  
6 case or enter chat rooms or blogs to do that. Also, do not  
7 use social media applications to research the case or discuss  
8 the case.

9 Finally, you must keep an open mind until you have not  
10 only heard all the evidence but also have heard the views of  
11 your fellow jurors during deliberations.

12 Thank you. We'll see you tomorrow morning at nine a.m.

13 (The jury was excused at 5:00 p.m. Trial to be continued  
14 on Thursday, August 29, 2013, at 9:00 a.m.)

15 (Jury charge conference were reported but not ordered  
16 transcribed herewith.)

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19 (Conclusion of requested transcript of proceedings.)  
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C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM  
THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

S/MARYANN T. MAFFIA, RDR  
Official Court Reporter